THE ECCLESIASTICAL LAW.

BY

RICHARD BURN, LL.D.
CHANCELLOR OF THE DIOCESE OF CARLISLE,
AND AUTHOR OF
'THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE.'

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BY ROBERT PHILIP TYRWHITT, ESQ
OF THE MIDDLE TEMPLE

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Ne admittas.

NE *admittas* (so called from those words in the writ, *prohibemus ne admittas*) is a writ directed to the bishop at the suit of one who is patron of any church, and he doubts that the bishop will collate a clerk of his own, or admit a clerk presented by another, to the same benefice: then he that doubts it shall have this writ, to prohibit the bishop that he shall not collate or admit any to that church, pending the suit. *Terms of the L.* (a)

New style. See Kalendar.

Nocturn.

NOCTURN, was a service so called, from the ancient Christians rising in the night to perform the same. *Gibs.* 263.

Nomination to a benefice. See Benefice.
Non-conformists. See Dissenters.
Non-residence. See Residence.
Notable goods. See Wills.

Notary public.

See Proctors.

1. A *Notary* was anciently a scribe, that only took *Notes* or minutes, and made short draughts of writings, and other instruments, both public and private. But at this day we call Notary who

(a) See *vol.* 1. *p.* 31.

him a notary public, who confirms and attests the truth of any deeds or writings, in order to render the same authentic. *Ayl. Par.* 382.

The law books give to a notary several names or appellations, as *actuarius*, *registrarius*, *scrinarius*, and such like. All which words are put to signify one and the same person. But in England, the word *registrarius* is confined to the officer of some court, who has the custody of the records and archives of such court; and is oftentimes distinguished from the *actuary* thereof. But a register ought always to be a notary public; for that seems to be a necessary qualification of his office.

2. A notary public is appointed to this office by the archbishop of Canterbury; who in the instrument of appointment decrees, that "full faith be given, as well in as out of judgment, "to the instruments by him to be made." Which appointment is also to be registered and subscribed by the clerk of his majesty for faculties in Chancery. 1 *Ought.* 486. *Ayl. Par.* 385.

By 41 *G.*3. (*U. K.*) c.79. it is enacted, that from and after August 1, 1801, no person shall be sworn, admitted, and inrolled, as a public notary, unless such person shall have been bound, by contract in writing or by indenture of apprenticeship, to serve as a clerk or apprentice, for the space of not less than seven years, to a public notary, or a person using the art and mystery of a scrivener (according to the privilege and custom of the city of London, such scrivener being also a public notary), duly sworn, admitted, and inrolled, and that such person, during the said term of seven years, shall have continued in such service; and also unless every such person who shall, from and after the said first day of August, be bound by contract in writing or indenture of apprenticeship, to serve as a clerk or apprentice to any public notary or scrivener, being also a public notary, shall, within three months next after the date of every such contract or indenture of apprenticeship, cause an affidavit to be made and duly sworn by one of the subscribing witnesses, of the actual execution of every such contract or indenture of apprenticeship by such public notary, or scrivener (being also a public notary), and the person so to be bound to serve as a clerk or apprentice as aforesaid; and in every such affidavit shall be specified the names of every such public notary or scrivener (being a public notary), and of every such person so bound, and their places of abode respectively, together with the day of the date of such contract or indenture of apprenticeship; and every such affidavit shall be sworn and filed within the time aforesaid, in the court where the public notary, to whom every such person respectively shall be bound as aforesaid, shall have been inrolled as a notary, with the proper officer or officers, or his or their respective deputy or deputies, who shall make or sign a memorandum of the day of filing

every such affidavit on the back or at the bottom of such contract or indenture. § 2.

And from the said first day of August, in case any person shall, in his own name or in the name of any other person, make, do, act, exercise, or execute and perform, any act, matter, or thing whatsoever, in anywise appertaining or belonging to the office, function, and practice of a public notary, for or in expectation of any gain, fee, or reward, without being admitted and inrolled, every such person for every such offence, shall forfeit and pay the sum of fifty pounds, to be sued for and recovered in manner therein mentioned. § 11.

And whereas the incorporated company of scriveners of London, by virtue of its charter, hath jurisdiction over its members being resident within the city of London, the liberties of Westminster, the borough of Southwark, or within the circuit of three miles of the said city, and hath power to make good and wholesome laws and regulations for the government and controul of such members, and the said company of scriveners practising within the aforesaid limits, and it is therefore expedient that all notaries resident within the limits of the said charter, should come into and be under the jurisdiction of the said company; be it therefore enacted, that all persons who may hereafter apply for a faculty to become a public notary, and practise within the city of London and the liberties thereof, or within the circuit of three miles of the same city, shall come into and become members, and take their freedom of the said company of scriveners, according to the rules and ordinances of the said company, on payment of such and the like fine and fees as are usually paid and payable upon the admission of persons to the freedom of the said company, and shall, previous to the obtaining such faculty, be admitted to the freedom of the said company, and obtain a certificate of such freedom, duly signed by the clerk of the same company for the time being, which certificate shall be produced to the master of faculties, and filed in his office prior to or at the time of issuing any faculty to such person to enable him to practise within the jurisdiction of the said company. § 13.

But nothing in this act contained shall extend, or be construed to extend, to any proctor in any ecclesiastical court in England; nor to any secretary or secretaries to any bishop or bishops, merely practising as such secretary or secretaries; or to any other person or persons necessarily created a notary public for the purpose of holding or exercising any office or appointment, or occasionally performing any public duty or service under government, and not as general practitioner or practitioners; any thing to the contrary notwithstanding: and nothing herein contained shall extend, or be construed to exempt any proctor, being also a public notary, from the pains, penalties, forfeitures,

and disabilities, by this act imposed upon any public notary who shall permit or suffer his name to be, in any manner, used for, or on account, or for the profit and benefit, of any person or persons, not entitled to act as a public notary. § 14. (1.)

3. A notary on his appointment must swear, "that he will faithfully exercise the office of notary public; that he will faithfully make contracts, wherein the consent of parties is required, by adding or diminishing nothing, without the will of the parties, that may alter the substance of the fact; that if in making any instrument the will of one party only is required, he will in such case add or diminish nothing that may alter the substance of the fact, against the will of such party; that he will not make instruments of any contract, in which he shall know there is a violence or fraud; that he will reduce contracts into an instrument or register; and after he shall so have reduced the same, that he will not maliciously delay to make a public instrument thereupon, against the will of him or them, on whose behalf such contract is to be so drawn: Saving to himself his just and accustomed fees."

4. A notary public (or actuary) that writes the acts of court, ought not only to be chosen by the judge, but approved also by each of the parties in suit; for though it does of common right belong to the office of the judge, to assume and choose a notary for reducing the acts of court in every cause into writing, yet he may be refused by the litigants; for the use of a notary was intended, not only on account of the judge, to help his memory in the cause, but also that the litigants might not be injured by the judge. *Al. Par.* 382.

And particularly, the office of a notary in a judicial cause is employed about three things: First, he ought to register and inroll all the judicial acts of the court, according to the decree and order of the judge, setting down in the act the very time and place of writing the same. Secondly, he ought to deliver to the parties, at their especial request, copies and exemplifications of all such judicial acts and proceedings as are there enacted and

(1) By § 15. all persons admitted as notaries public before 27 *June* 1801, may act as such notwithstanding this act. By § 16. pecuniary penalties imposed for offences against this act are recoverable in courts at Westminster by action of debt, &c. or information, with full costs to plaintiff if he recovers. By § 17. limitation of actions against persons for matters done in pursuance of this act, 3 months — General issue — treble costs.

By 1 & 2 *G*.4. *c*.48. § 3. nothing in 41 *G*. 3. (*U.K.*) *c*.79. shall extend to the registrars or solicitors of the universities of Oxford or Cambridge, or to the steward or solicitors of any college or hall in either, or to the chapter clerk of any cathedral or collegiate church, acting only as such registrars, &c.

decreed. And, thirdly, he ought to retain and keep in his custody the originals of such acts and proceedings, commonly called the *protocols* (*πρωτα κωλα*, the *notes*, or *first draughts*).

5. As a notary is a public person, so consequently all instruments made by him are called public instruments; and a judicial register of record made by him, is evidence in every court, according to the civil and canon law. And a bishop's register establishes a perpetual proof and evidence, when it is found in the bishop's archives; and credit is given not only to the original, but even to an authentic copy exemplified. *Ayl. Par.* 386. Authenticity of his proceedings.

And one notary public is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it. *Id.*

And the rule of the canon law is, that one notary is equal to the testimony of two witnesses. *Gibs.* 996.

6. [By 55 *G.* 3. *c.* 184. Sched. Part I. tit. FACULTY, the admission of a notary shall be upon a 30*l.* stamp. Stamps

And every notarial act shall be on a 5*s.* stamp. *Id. tit.* NOTARIAL ACT, with progressive duty of 5*s.* on every sheet thereof after the first.]

Novel disseisin.

THE writ of assise of novel disseisin (*novæ disseisnæ*) lieth, where tenant for life, or tenant in fee simple, or in tail, is disseised of his lands or tenements, or put out thereof against his will. *F. N. B.* 108.

November the fifth. See Holidays.
Nuncupative will. See Wills.

Oaths.

1. NONE shall bring into dispute the determinations of the church, concerning oaths to be taken in the ecclesiastical or in the temporal courts; on pain of being declared an heretic. *Lynd.* Lind. 297. Lawfulness of an oath. [4]

As we confess that vain and rash swearing is forbidden Christian men by our Lord Jesus Christ, and James his apostle; so we judge that Christian religion doth not prohibit, but that a man may swear when the magistrate requireth, in a cause of faith and charity, so it be done according to the prophet's teaching, in justice, judgment, and truth. *Art.* 39.

The giving of every oath must be warranted by act of parliament, or by the common law time out of mind. 2 *Inst.* 73.

2. The oath *ex officio*, is an oath whereby any person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself or herself, of any criminal matter or thing, whereby he or she may be liable to any censure, penalty or punishment whatsoever.

By a canon of archbishop Boniface: *Laymen shall be compelled by excommunication, if need be, to take an oath to speak the truth, when enquiry shall be made by the prelates and judges ecclesiastical, for the correction of sins and excesses.* Lind. 109.

Afterwards, *E.* 4 *J.* In the time of the parliament, the lords of the council at Whitehall demanded of Popham and Coke chief justices, upon motion made by the commons in parliament, in what cases the ordinary may examine any person *ex officio* upon oath. And upon good consideration and view of the books, they answered to the lords of the council at another day in the council chamber: 1. That the ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by the law to answer them. And so is the course of the chancery; the defendant hath a copy of the bill delivered unto him, or otherwise he need not answer it. 2. That no man, ecclesiastical or temporal, shall be examined upon the secret thoughts of his heart, or of his secret opinion; but something ought to be objected against him, which he hath spoken or done. 3. That
5] no layman may be examined *ex officio*, except in two causes (matrimonial and testamentary); and that was grounded upon great reason: for laymen for the most part are not lettered, wherefore they may easily be inveigled and intrapped, and principally in heresies and errors. 12 *Co.* 26.

Again, *H.* 13 *J. Dighton* and *Holt*'s case. They were committed by the high commissioners, because they refused to take the oath *ex officio*; whereupon an habeas corpus being awarded, it was returned, that they were committed, because they being convented for slanderous words, against the book of common prayer and the government of the church, and being tendered the oath to be examined upon these causes, they refused, and were therefore committed. And after three terms deliberation, the court now gave their resolution, that they ought to be delivered. And the reason thereof Coke chief justice declared to be, because this examination is made to cause them to accuse themselves of the breach of a penal law; which is against law, for they ought to proceed against them by witnesses, and not inforce them to take an oath to accuse themselves. *Cro. Ja.* 388.

Finally, by the statute of 13 *C.* 2. *c.* 12. *it is enacted*, that it shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

But in other cases, where the course of the ecclesiastical courts hath been, to receive answers upon oath, they may still receive them. And therefore in the case of *Hern* and *Brown*, *T.* 31 *C.* 2. where a suit was for payment of the proportion assessed towards the repair of the church, the defendant offering to give in his answer, but not upon oath, prayed a prohibition, because it was refused. The court, after hearing arguments, denied the prohibition; for they said, it was no more than the chancery did to make defendants answer upon oath in such like cases. *Gibs.* 1011. 1 *Ventr.* 339.

And some years before that, in the case of *Goulson* and *Wainwright*, it was held by the court, that if articles *ex officio* are exhibited in the spiritual court for matters *criminal*, and the party is required to answer upon oath, he may have a prohibition: but if it be a *civil* matter, he cannot do so, for then he is bound to answer. *Gibs.* 1011. 1 *Sid.* 374. [6]

Oath of calumny.

3. The oath of *calumny* was required by the Roman law, of all persons engaged in any lawsuit, obliging both plaintiffs and defendants, at the beginning of the cause, to swear that their demands and their defences were sincere and upright, without any intention to give unnecessary trouble, or to use quirks and cavils. 1 *Domat.* 439.

And by a legatine constitution of *Otho* it is thus ordained: *The oath of* calumny, in causes ecclesiastical and civil, for speaking the truth in spirituals whereby the truth may be more easily discovered, and causes more speedily determined, we ordain for the future *to be taken* in the kingdom of England, according to the canonical and legal sanction, *the custom obtained to the contrary notwithstanding*. *Athon.* 63.

The oath of calumny] Which oath was this: "You shall "swear, That you believe the cause you move is just: That "you will not deny any thing you believe is truth, when you "are asked of it: That you will not (to your knowledge) use "any false proof: That you will not out of fraud request any "delay, so as to protract the suit: That you have not given or "promised any thing, neither will give or promise any thing, in "order to obtain the victory, except to such persons to whom "the laws and the canons do permit: So help you God." *Consct.* 91.

Of calumny] Jusjurandum calumniæ; sc. vitandæ: for the avoiding of calumny. *Athon.* 60.

To be taken] And this both by the plaintiff and the defendant. Which if they shall refuse respectively, the plaintiff in such case shall lose his cause, and the defendant shall be taken as having confessed. *Athon.* 60.

The custom obtained to the contrary notwithstanding] By this it appeareth, that by the custom of the realm of England the oath of calumny was not to be administered. Nevertheless this custom was not so general as in this canon is alleged. The case was thus: *Laymen* were free by the custom of the realm from taking of that oath, unless it were in causes *matrimonial* and *testamentary*; and in those two cases the ecclesiastical judge might examine the parties upon their oath, because contracts of matrimony, and the estates of the dead, are many times secret,
7] and do not concern the shame and infamy of the party, as adultery, incontinency, simony, heresy, and such like. And this appeareth by two writs in the register, directed to the sheriff, to prohibit the ordinaries from calling laymen in that oath against their wills, except in those two cases. 2 *Inst.* 657. 12 *Co.* 26. *Gibs.* 1011.

But this custom extended not to those of the clergy, but to lay people only; for that they of the clergy, being presumed to be learned men, were better able to take the oath of calumny. 2 *Inst.* 657.

But if, in a penal law, the jurisdiction of the ordinary be saved, as by 1 *Eliz.* for hearing of masses, or by 13 *Eliz.* for usury, or the like, neither clerk nor layman shall be compelled to take the oath of calumny: because it may be an evidence against him at the common law, upon the penal statute. 2 *Inst.* 657. 12 *Co.* 27.

This oath had long continuance in the ecclesiastical court: and it had the warrant of an act of parliament, in 2 *H.* 4. *c.* 15. whereby it was enacted, that diocesans shall proceed *according to the canonical sanctions*; which act was repealed by 25 *H.* 8. *c.* 24. but was revived in the reign of queen Mary, and then all the martyrs who were burnt were examined upon their oaths; and then again by the 1 *Eliz.* *c.* 1. it was finally repealed. And the matter touching this oath at this day standeth thus: It is confessed, as well by the said provincial constitution of *Otho*, as by the register, that the said constitution was against the custom of the realm: and no custom of the realm can be taken away by a canon of the church, but only by act of parliament; and especially in case of an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry, and commonalty of the realm of both sexes: And by the statute of the 25 *H.* 8. *c.* 19. no canon against the king's prerogative, the law, statutes, or cus-

tom of the realm, is of force; which is but declaratory of the common law. 2 *Inst.* 658. 12 *Co.* 29.

So that the result of the matter, upon these premises, will be this: So far as this constitution was against the custom of the realm, it is of no avail: so far as it is warranted by the custom, it is still of force; and consequently extendeth to the clergy, and to laymen in cases matrimonial and testamentary, and also to persons who take the said oath voluntarily, and not by compulsion.

For the writs in the register do only require, that laymen be [8] not compelled to answer *against their will;* so that if any assent to it, and take it without exception, this standeth with law. 12 *Co.* 27.

4. The *voluntary* or *decisive* oath, is given by one party to the other, when one of the litigants, not being able to prove his charge, offers to stand or fall by the oath of his adversary; which the adversary is bound to accept, or to make the same proposal back again, otherwise the whole shall be taken as confessed by him. *Wood Civ. L.* 314. (*b*) — The voluntary or decisive oath.

And this seemeth to have some foundation in the common law, in what is called *waging of law;* which is a privilege that the law giveth to a man, by his own oath to free himself, in an action of debt upon a simple contract. 1 *Inst.* 155. 157. 2 *Inst.* 45.

But this oath, in the ecclesiastical courts, is now obsolete, and out of use. 1 *Ought.* 176.

5. The oath of *truth*, is when the plaintiff or defendant is sworn upon the libel or allegation, to make a true answer of his knowledge as to his own fact, and of his belief of the fact of others. This differs from the former, for it is not decisive; and the plaintiff or defendant may proceed to other proofs, or prove the contrary to what is sworn. *Wood Civ. L.* 814. — Oath of truth.

6. The oath of *malice*, is when the party proponent swears that he doth not propose such a matter or allegation, out of malice, or with an intent unnecessarily to protract the cause. 1 *Ought.* 158. — Oath of malice.

And this oath may be administered at any time during the suit, at the judge's discretion, whether the parties consent to it or not. *Id.*

7. The *necessary* or *suppletory* oath, is given by the judge to the plaintiff or defendant, upon half proof already made. This being joined to the half proof *supplies*, and gives sufficient power to the judge to condemn or absolve. It is called the *necessary* oath, because it is given out of necessity, at the instance of the party, whether the other party will consent to it or not. But — Suppletory oath.

(*b*) *Qui jusjurandum defert prior de calumnia debet jurare si hoc exigatur.* Dig. 12. 2. 34. § 4.

when the judge doth administer it, he ought first to be satisfied, that there is a half proof already made, by one unexceptionable witness, or by some other sort of proof. If the cause is of an high nature, and there is a temptation to perjury; or if it is a criminal cause; or if more witnesses might be produced to the same fact; then this oath cannot take place. *Wood Civ. L.* 314. *Ayl. Par.* 391.

Before the delegates at Sergeants Inn, Jan. 22, 1717. *Williams* and Lady *Bridget Osborne*. The question below was, whether Mr. Williams was married to the lady Bridget Osborne, the minister who performed the ceremony, having formerly confessed it extrajudicially, but now denying it upon oath. So that there being variety of evidence on both sides, the judge upon hearing the cause required, according to the method of ecclesiastical courts, the oath of the party, which the civilians term the suppletory oath, that he was really married as he supposeth in his libel and articles. The accepting this oath (as was agreed on both sides) is discretionary in the judge, and is only used where there is but what the civilians esteem a semiplena probatio; for if there be full proof, it is never required; and if the evidence doth not amount to a half proof, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a half proof, a confirmation of it by the party's own oath, will not alter the case. Upon admitting the party to his suppletory oath, the lady appeals to the delegates. So that the question now was not upon the merits, whether there really was a marriage or not, but only upon the course of the ecclesiastical courts, whether the judge in this case ought to have admitted Mr. Williams to his suppletory oath, as a person that had made a half proof of that which he was then to confirm. The questions before the delegates were two: First, whether the suppletory oath ought to be administered in any case to inforce a half proof: And, secondly, admitting it might, whether the evidence in this case amounted to a half proof, so as to entitle Mr. Williams to pray that his suppletory oath might be received. As to the first, it was argued to be against all the rules of the common law, that a man should be a witness in his own cause. It is not allowed in the temporal courts in any case but that of a robbery, which being presumed to be secret, the party is admitted to be a witness for himself. In the temporal courts no man can be examined that has any interest, though he be no party to the suit. On the other side many authorities and precedents were cited out of the civil law, to prove this practice of allowing a suppletory oath. And therefore the court held, that by the canon and civil law, the party agent, making a half proof, was entitled to pray that his suppletory oath might be received:

And though it be against the rules of the common law, yet this being a cause of ecclesiastical cognizance, the civil and not the common law is to be the measure of their proceedings; and therefore this practice being agreeable to the civil law, is well warranted in all cases where the civil law is the rule, and the exercise of it lies in the discretion of the judge. Secondly, it being therefore established, that a person, making half proof, is entitled to his oath, the next question was, What is, according to the notion of the civilians and canonists, a half proof? With them it was argued, on the behalf of the lady, that nothing is esteemed as a *full* proof, unless there be two positive unexceptionable witnesses to the very matter of fact, as to the marriage; that a half proof, which is the next degree of evidence, is what is affirmed by the oath of one witness as to the principal fact, and confirmed by concurrent circumstances: It must be by *one* witness; it must be evidence that concludes necessarily, and not by presumption; there must be no presumption to encounter it; the witness must be of good repute: That matrimonial causes require the greatest certainty; and where that is the sole question, the proof ought to be fuller than where it comes in by incident, as on granting administration. To this it was answered on the other side, that half proof implies no more than what the common lawyers call presumptive evidence; and that is properly called presumptive evidence, which hath no one positive witness to support it, but relies only on the strength of circumstances. And when there is one witness, who deposeth directly to the principal fact, this immediately ceaseth to bear the name of presumption, and assumes that of positive evidence. And that which in the temporal courts passeth for positive evidence, is the same degree of evidence with the full proof of the canonists and civilians. The suppletory oath doth ex vi termini import, that there has been no one positive witness to the principal fact; and he that demands to be admitted to take his oath, doth thereby admit that he hath produced no conclusive evidence to the point in issue, and therefore the party himself supplies the place of the witness. There is no fixing the bounds of a half proof; for in many cases circumstances may overbear positive evidence: and then if those circumstances should not be esteemed to amount to a half proof, when the positive evidence would exceed it; that would be to overthrow the positive evidence, by that which is not [11] so strong. Half proof therefore they concluded to be, that degree of evidence which would incline a reasonable man to either side of the question; and implies in the notion of it, that a positive witness hath not deposed to the principal fact. And in this case, though there was no positive conclusive evidence, but only such as depended on circumstances, as confessions, and letters, and unusual familiarities, yet the court thought it amounted to

a half proof (*c*), and consequently that the dean of the arches had done right, in admitting Mr. Williams to his suppletory oath: And therefore they dismissed the appeal, with 150*l.* costs. *Str.* 80.

The party praying this oath, must exhibit a schedule ingrossed, with his hand to it, wherein is written so much as is proved more than half proof, or half proof; and must take his oath to speak the truth of his own certain knowledge. 1 *Ought.* 177. (*d*)

Oath in animam domini.

8. By the ancient canon law, a proctor having a special proxy, may take the oath of calumny, and may swear *in animam domini;* upon the soul of his client. *Wood Civ. L.* 298.

But by *Can.* 132. It is ordained, that forasmuch as in the probate of testament and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts, *In animam constituentis*, is found to be inconvenient; therefore from henceforth every executor, or suitor for administration, shall personally repair to the judge in that behalf, or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases.

Oath of damages.

9. The oath *in litem*, or of *damages*, is that by which the plaintiff estimates the damages in the loss of any thing; and which the judge may allow or moderate. *Wood Civ. L.* 314.

Oath of costs.

10. The oath of *expences* and *costs*, is where the litigant (which gained the sentence or decree), upon the taxing of costs, affirms upon his oath that these charges were necessarily expended by him in the prosecution of his suit. *Wood Civ. L.* 314.

[12] All these oaths are unknown to the common law, but they were all used in the courts governed by the civil or canon law. *Wood Civ. L.* 314.

But they are only made use of in civil causes, and cannot be properly applied to criminal. *Wood Civ. L.* 333. But the oath next following regardeth only criminal cases: That is to say,

Oath of purgation.

11. The oath of *purgation*, which oath was administered where the defendant was suspected to be guilty; and if he swore that he was innocent, and produced honest men for his compurgators, he was to be discharged. If he could not bring such compurgators, to swear that they also believed him innocent, he was esteemed as convicted of such crime. *Wood Civ. L.* 332.

But by the aforesaid act of the 13 *C.* 2. *c.* 12. it shall not be

(*c*) See Evidence, 1. *in note.*

(*d*) According to civilians this oath is not tendered by either party, but required by the judge *inopiâ probationum*, and it is either *suppletory* or *purgatory*, according as it is tendered to the plaintiff or defendant; but they agree that it ought rarely to be used, the maxim being, ***actore non probante, reus absolvitur.*** See *Huber ad Dig.* 12. 2. 12.

lawful for any person exercising ecclesiastical jurisdiction, to tender or administer to any person, any oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to *purge* him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

12. Besides the above recited, there are also divers other oaths of use in the courts: As, the oath of the proctor, that he hath not questioned the witnesses; the oath of the proctor, concerning his bill of costs; the oath of the party, for the obtaining of absolution, that he will stand to the law, and obey the commands of the church; the oath of the party, on his being admitted in forma pauperis; the oath of the party, concerning matter newly come to his knowledge; the oath of the party that he believes he can prove the matter alleged; the oath of a creditor, concerning his debt; the oath of an executor, administrator, accountant, churchwardens, questmen, curates, preachers, schoolmasters, physicians, surgeons, midwives, and other such like. 1 *Ought.* 176.

Other oaths of use in the courts.

13. The oath of *allegiance* is very antient: and by the common law, every freeman at his age of twelve years was required, in the leet (if he were in any leet), or in the tourn (if he were not in any leet), to take the oath of allegiance. 2 *Inst.* 73.

Oath of allegiance.

But the clergy, not being bound to attend at the tourn or leet, were consequently so far exempted from taking this oath of allegiance. 2 *Inst.* 121. 1 *H. H.* 64.

But they were bound nevertheless to do homage to the king, for the lands held of him in right of the church. 1 *H. H.* 71, 72.

14. The oath of *supremacy* came in after the reformation, in consequence of abolishing the papal authority. And this oath all clergymen especially were bound to take.

Oath of supremacy.

[13]

15. The oath of *abjuration* came in after the revolution; received some alterations in the first year of queen Anne; and again in the first year of king George the first; and finally in the sixth year of king George the third. And this oath, together with the oaths of allegiance and supremacy, all clergymen as well as others are bound to take, on their being promoted to offices.

Oath of abjuration.

16. In all cases wherein by any act of parliament an oath shall be allowed, authorised, or required, the solemn affirmation or declaration of any of the people called quakers shall be allowed instead of such oath, although no particular or express provision be made for that purpose in such act. 22 *G.* 2. *c.* 46. § 36.

Oaths of quakers. [See 1 W. & M. c. 18. s. 13. as commented on 2 vol. 197. *note.*]

And if any person making such affirmation or declaration shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been deposed upon oath in the usual form, would have

amounted to wilful and corrupt perjury; he shall suffer as in cases of perjury. *22 G. 2. c.* 46. § 36.

But no quaker by virtue hereof shall be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government. § 37.

Of the Moravians.

17. By the *22 G. 2. c.* 30. Every person being a member of the protestant episcopal church, known by the name of *Unitas fratrum*, or the united brethren, which church was formerly settled in *Moravia* and *Bohemia*, and are now in *Prussia*, *Poland*, *Silesia*, *Lusatia*, *Germany*, the *United Provinces*, and also in his majesty's dominions, who shall be required to take an oath, shall be allowed instead of such oath to make their solemn affirmation: But this not to qualify them to give evidence in a criminal cause, or to serve on juries.

Of infidels or aliens.

18. Such oaths ought to be imposed on heathens and Jews, which they allow to be obligatory. *Wood Civ. L.* 313.

Thus a Jew is to be sworn upon the old testament; and perjury upon the statute may be assigned upon this oath. 2 *Keb.* 314. See *Jew*.

And when Jews take the oath of abjuration, the words [*on the true faith of a Christian*] shall be omitted. 10 *G. c.* 4. § 18.

[14] Thus also Mahometans shall be sworn upon the Koran. *Str.* 1104.

In the case of *Omichund* and *Barker*, *H.* 18 *G.* 2. a commission issued out of chancery, to take the answer of Omichund the defendant, and the depositions of several witnesses, who were heathens of the Gentou religion, in their own country manner, at Calcutta in the East Indies; and the commission being executed and returned, the depositions were allowed to be read in the court of chancery, by lord Hardwicke, assisted by the two lords chief justices and the lord chief baron. The manner of taking which oath was thus: there were three bramins or priests present; and the oath being interpreted to each witness, the witness touched the feet of one of the bramins, and two being bramins or priests did touch his hand. 2 *Abr. Eq. Cas.* 397.

At the rebel assizes at Carlisle, in the year 1745, many of the Scotch witnesses refusing to be sworn otherwise than in their own country manner; the judges so far submitted, as to allow them to be sworn after the Scotch manner for finding the bills, by the grand jury, but did not admit it upon the trials.

Oaths and declarations to qualify for offices.

19. By the 25 *C.* 2. *c.* 2. Every person who shall be admitted into any office civil or military, or shall receive any pay by reason of any patent or grant from the king, or shall have any command or place of trust in England or in the navy, or shall have any service or employment in the king's household, shall within three months after his admission receive the sacrament according to the usage of the church of England, in some public church on

the Lord's day, immediately after divine service and sermon: and in the court where he takes the oaths (as hereunder mentioned) he shall first deliver a certificate of such his receiving the sacrament, under the hands of the minister and churchwardens, and shall then make proof of the truth thereof by two witnesses on oath. And they shall also, when they take the said oaths, make and subscribe the declaration against transubstantiation. § 2, 3. 9. [But this declaration cannot now be required of those catholicks who shall take and subscribe the declaration and oath introduced by 31 *G.* 3. *c.* 32. *Vid. infra*, 20 *B.*]

Any office civil or military] Ecclesiastical offices do not seem to be included within this description: and consequently it seemeth not requisite for clergymen, in qualifying for ecclesiastical offices, to produce any certificate of their having received the sacrament, [15]
nor to make or subscribe the declaration against transubstantiation. But they are to take the oaths in like manner as civil officers, by the 1 *G. st.* 2. *c.* 13. which enacteth as follows:

Every person who shall be admitted into any office civil or military; or shall receive any pay by reason of any patent or grant from the king; or shall have any command or place of trust in England, or in the navy; or shall have any service or employment in the king's household; all ecclesiastical persons; heads and members of colleges, being of the foundation, or having any exhibition, of eighteen years of age; and all persons teaching pupils; schoolmasters and ushers; preachers and teachers of separate congregations,—shall (within six calendar months after such admission, 9 *G.* 2. *c.* 26. § 3.) take and subscribe the oaths of allegiance, supremacy, and abjuration, in one of the courts at Westminster, or at the general or quarter sessions. § 2. And this to be between the hours of nine and twelve in the forenoon, and no other. 20 *G.* 2. *s.* 2.

But this is not to extend to churchwardens, nor to any like inferior civil office. 1 *G. st.* 2. *c.* 13. § 20.

And every person making default herein, shall be incapable to hold his office; and if he shall execute his office, after the time expired, he shall, upon conviction, be disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and shall forfeit 500*l.* to him who shall sue. 1 *G. st.* 2. *c.* 13. § 8.

But generally there is an indemnifying clause in some act of parliament every two or three years, on condition that the persons qualify within the time therein prescribed.

And persons forfeiting their office may take a new grant thereof, on their taking the oaths, and conforming; provided it was not filled up before. 1 *G. st.* 2. *c.* 13. § 14.

In the universities, where persons shall not take the oaths, or

shall not produce a certificate thereof, to be registered in their proper college, and others be not elected in their places within twelve months, the king shall appoint and nominate. 1 *G. st.* 2. *c.* 13. § 12, 13.

[16] 20. The oath of allegiance by the 1 *G. st.* 2. *c.* 13. is this:

Forms thereof. *I A. B. do sincerely promise and swear, that I will be faithful, and bear true allegiance to his majesty king George: So help me God.*

The oath of supremacy by the same statute.

I A. B. do swear, that I do from my heart abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm: So help me God.

The oath of abjuration by the 6 *G.* 3. *c.* 53.

I A. B. do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before God and the world, that our sovereign lord king George is lawful and rightful king of this realm, and all other his majesty's dominions thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that not any of the descendants of the person who pretended to be prince of Wales during the life of the late King James the second, and since his decease pretended to be, and took upon himself the stile and title of king of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the stile and title of king of Great Britain, hath any right or title whatsoever to the crown of this realm, or any other the dominions thereunto belonging: and I do renounce, refuse, and abjure any allegiance or obedience to any of them. And I do swear, that I will bear faith and true allegiance to his majesty king George, and him will defend to the utmost of my power, against all traiterous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour to disclose and make known, to his majesty and his successors, all treasons and traiterous conspiracies which I shall know to be against him or any of them. And I do faithfully promise to the utmost of my power, to support, maintain, and defend the succession of the crown against the descendants of the said James, and against all other persons whatsoever: which succession by an act entitled An Act for the further limitation of the crown, and better securing the rights and liberties of the subject, *is and stands limited to the princess Sophia, electress and duchess dowager of Hanover, and the heirs of her body, being protestants. And all these things I do plainly and sincerely acknowledge and swear, according to these express words*

by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God.

The declaration against transubstantiation, by the 25 *C.*2. *c.*2. [or "Test Act"] is this:

I A. B. do declare, that I do believe, that there is not any transubstantiation in the sacrament of the Lord's supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever.

The declaration against popery, by the 30 *C.*2. *st.*2. *c.*1. is as follows:

I A. B. do solemnly and sincerely, in the presence of God, profess, testify, and declare, that I do believe that in the sacrament of the Lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever: And that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous: And I do solemnly in the presence of God profess, testify and declare, that I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or *without any hope of any such dispensation from any person or authority whatsoever,* or *without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null and void from the beginning.*

Or without any hope of dispensation, —— *or without thinking that I am or can be acquitted, &c.*] By this disjunctive [*or*] here twice occurring, this declaration seemeth to be rendered somewhat loose and unconnected, and leaveth scope for equivocation. The word [*and*] seemeth to have been intended, and would render the declaration more compact.

[20 B. By the 31 *G.*3. c.32. Catholicks who shall take and subscribe the following declaration and oath, in any of his majesty's courts at Westminster, or any court of general quarter sessions, between the hours of nine in the morning, and two in the afternoon, are relieved from divers penalties and disabilities. See Popery, *passim.* [18] Declaration and oath of catholicks.

Declaration. *I A. B. do declare, that I do profess the Roman catholick religion.*

Oath. *I A. B. do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty king George the third; and him will defend to the utmost of my power against all conspiracies and attempts whatever that shall be made against his person, crown, or dignity: and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them: And I do faithfully promise to maintain, support and defend, to the utmost of my power, the succession of the crown; which succession, by an act intituled,* An act for the further limitation of the crown, and better securing the rights and liberties of the subject, *is and stands limited to the princess Sophia, electress and dutchess-dowager of Hanover, and the heirs of her body, being protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of these realms: And I do swear, that I do reject and detest, as an unchristian and impious position, that it is lawful to murder or destroy any person or persons whatsoever, for or under pretence of their being hereticks or infidels; and also that unchristian and impious principle, that faith is not to be kept with hereticks or infidels: And I further declare, that it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated by the pope and council, or any authority of the see of Rome, or by any authority whatsoever, may be deposed or murdered by their subjects, or any person whatsoever. And I do promise that I will not hold, maintain, or abet any such opinion, or any other opinions, contrary to what is expressed in this declaration: And I do declare, that I do not believe that the pope of Rome, or any other foreign prince, prelate, state, or potentate, hath or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. And I do solemnly in the presence of God, profess, testify, and declare, that I do make this* [19] *declaration, and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatever, and without any dispensation already granted by the pope, or any authority of the see of Rome, or any person whatever, and without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope or any other person or authority whatsoever, shall dispense with or annul the same, or declare that it was null or void. So help me God.*]

Forms of quakers' affirmations and declarations. 21. By the 8 G. c.6. The quakers' solemn affirmation, instead of an oath, is this:

I A. B. do solemnly, sincerely, and truly declare and affirm.

By the same act, instead of the declaration of fidelity provided

by 1 *W. & M. sess.* 1. *c.* 18. quakers shall be allowed to make the following declaration of fidelity:

I A. B. do solemnly and sincerely promise and declare that I will be true and faithful to king George; and do solemnly, sincerely, and truly profess, testify, and declare, that I do from my heart abhor, detest, and renounce, as impious and heretical, that wicked doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any power, jurisdiction, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm.

And by the same act, they were allowed to take the effect of the abjuration oath, in these words:

I A. B. do solemnly, sincerely, and truly acknowledge, profess, testify, and declare, that king George is lawful and rightful king of this realm, and of all other his dominions and countries thereunto belonging, and I do solemnly and sincerely declare, that I do believe the person pretended to be the prince of Wales, during the life of the late king James, and since his decease, pretending to be, and taking upon himself the stile and title of king of England, by the name of James the third, or of Scotland, by the name of James the eighth, or the stile and title of king of Great Britain, hath not any right or title whatsoever to the crown of this realm, nor any other the dominions thereunto belonging; and I do renounce and refuse any allegiance or obedience to him. And I do solemnly promise, that I will be true and faithful, and bear true allegiance to king George, and to him will be faithful against all traitorous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my best endeavour to disclose and make known to king George, and his successors, all treasons and traitorous conspiracies, which I shall know to be [20]
against him, or any of them. And I will be true and faithful to the succession of the crown against him the said James, and all other persons whatsoever, as the same is and stands settled by an act, intituled, An act declaring the rights and liberties of the subject, and settling the succession of the crown, *to the late queen Anne, and the heirs of her body, being protestants; and as the same by one other act, intituled,* An act for the further limitation of the crown, and better securing the rights and liberties of the subject, *is and stands settled and intailed, after the decease of the said late queen; and for default of issue of the said late queen, to the late princess Sophia, electress and dutchess-dowager of Hanover, and the heirs of her body, being protestants. And all these things I do plainly and sincerely acknowledge, promise, and declare, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words without any*

equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, renunciation, and promise, heartily, willingly, and truly.

Since the death of the late pretender, who assumed the title of King of England by the name of James the third, it is absurd to renounce the same person being dead; and therefore the aforesaid act of the 6 *G.* 3. *c.* 53. altered the form of the *oath* of abjuration, so as to abjure the *descendants* of the said James. But no provision is made for altering in like manner the quakers' form of renunciation.

The quakers' profession of their belief, by the 1 *W. c.* 18. is this:

I A. B. profess faith in God the Father, and in Jesus Christ his eternal Son, the true God, and in the Holy Spirit, one God blessed for evermore; and do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.

Of the Moravians.

22. The affirmation of the *Moravians* shall be *in these words: I A. B. do declare, in the presence of Almighty God, the witness of the truth of what I say.* 22 G. 2. c. 30. § 1.

AN *obit* was an office performed at funerals, when the corpse was in the church, and before it was buried; which after-
[21] wards came to be anniversary, and then money or lands were given towards the maintenance of a priest who should perform this office every year. *Nels.* tit. Obit. *Ayl. Par.* 395.

Oblations. See Offerings.
Obventions. See Offerings.

Offerings.

OFFERINGS, *oblations* (*e*), and *obventions*, are one and the same thing: though *obvention* is the largest word. And under

(*e*) [*Com. Dig.* tit. *Prohibition.* (G 11.)] The term *Oblation*, in the canon law, means whatever is in any manner offered to the church by the pious and faithful, whether it be moveable or immoveable property. X. 5. 40. 29. *Spelm. in Concil.* vol. i. p. 39. These offerings were given on various occasions, such as at burials and marriages, by penitents, at festivals, or by will. But they were not to be received from persons excommunicated, or who had disinherited their sons, or been guilty of injustice, or had oppressed the poor. Such offerings constituted at first the chief revenues of the church.

these are comprehended, not only those small customary sums commonly paid by every person when he receives the sacrament of the Lord's supper at Easter, which in many places is by custom *2d.* from every communicant, and in London *4d.* an house; but also the customary payment for marriages, christenings, churchings, and burials. *Wats. c.* 52.

Concerning which, it is enacted by the *statute of the* 2 & 3 *E.* 6. *c.* 13. that all persons which by the laws or customs of this realm ought to make or pay their offerings, shall yearly well and truly content and pay the same to the parson, vicar, proprietor, or their deputies or farmers of the parishes where they shall dwell or abide; and that, at such four offering days, as at any time heretofore within the space of four years last past hath been used and accustomed for the payment of the same; and in default thereof, to pay for the said offerings at Easter then next following. [And see *Ayl. Par. Jur. Can. Ang.* 395.] [22]

The *four offering days* are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church. *Gisb.* 739.

Easter offerings.

Concerning the offerings at *Easter*; it is directed by the rubrick at the end of the communion office, that *yearly at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomably due, then and at that time to be paid.*

And, it hath been decreed, that Easter offerings are due of common right, and not by custom only. *Bunb.* 173. [Where it is said by B. Gilbert, that offerings were a compensation for personal tithes. *Ib.* 198. (2)]

So in the case of *Carthew* and *Edwards, T.* 1749; it was decreed by the court of Exchequer, that Easter offerings were due to the plaintiff of *common right*, after the rate of *2d.* a head for every person in the defendant's family of 16 years of age and upwards, to be paid by the defendant.

When established by custom, they may now be recovered as small tithes before two justices of the peace, by the 7 & 8 *W.* 3. *c.* 6. and subsequent acts. See Tithes, *VII.* 9. Offerings are made at the holy altar by the king and queen twelve times in the year on festivals called *offering days*, and distributed by the dean of the chapel to the poor. James the first commonly offered a piece of gold, having the following mottoes: *Quid retribuam domino pro omnibus quæ tribuit mihi? Cor contritum et humiliatum non despiciet Deus. Lex Constit.* 184. The money in lieu of these accustomed offerings is now fixed at 50 guineas a year, and paid by the privy purse annually to the dean or his order; for the distribution of which offertory money, the dean directs proper lists of poor people to be made out. *Ex. MSS.*

(2) Offerings are due by the common law at the rate of *2d.* per head. *Bunb.* 173. *pl.* 425. And the same point was again determined in *Carthew* v. *Edwards, Trin.* 1749, in the Exchequer; but

Besides the oblations on the four principal festivals, there were occasional oblations upon particular services; of which there were some free and voluntary, which the parishioners or others were not bound to perform but *ad libitum*; there were others by custom certain and obligatory, as those for marriages, christenings, churching of women, and burials. *Deg. p.* 2. *c.* 23.

Those offerings which were free and voluntary are now vanished, and are not comprehended within the aforesaid statute; but those that were customary and certain, as for communicants, marriages, christenings, churching of women and burials, are confirmed to the parish priests, vicars, and curates of the parishes where the parties live that ought to pay the same. *Deg. p.* 2. *c.* 23. (3)

Particularly, at the burial of the dead, it was a custom for the surviving friends, to offer liberally at the altar, for the pious use of the priest, and the good estate of the soul of the deceased. *Ken. Par. Ant. Gloss.*

[23] And from hence the custom still continueth in many places, of bestowing alms to the poor on the like occasions.

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by custom it may be more. And by custom more may be payable. *Egerton* v. *Still*, *Bunb.* 198. *Lawrence* v. *Jones*, *Id.* 173. *Vernon* v. *Sloane*, *Gwm.* 889. Thus an offering of 4*d.* for each married householder, 1½*d.* for every son, daughter, or other servant not having wages, and 2*d.* for every servant having wages, if they receive the sacrament, is good. *Swaine* v. *Penn*, 1 *Wood's Dec.* 341. In London, it is mentioned in several books of authority that a groat a house is due. *Hob.* 11. *Godolph. Repert. canon.* edit. 1687, p. 427. *Wats.* 585. But I have not discovered on what this opinion of a groat a house for offerings in London is founded: Hobart refers to the statute, but does not mention any statute in particular. Now, by the statute 37 *H.* 8. *c.* 12. § 12. every householder in London, paying 10*s.* rent or above, shall be discharged of offerings; but his wife and children, or others, taking the rites of the church, at Easter should pay 2*d.* each for their offerings yearly. (As to the present force of this act, see "Tyrwhitt's Argument on the Non Enrolment in Chancery of the "Decree for Tithes in London, annexed to 37 *H.* 8. *c.* 12." Published by Butterworths, 1823.) London is excepted out of the 27 *H.* 8. *c.* 20. by § 2., and out of 2 & 3 *E.* 6. *c.* 13. by § 12., and out of 7 & 8 *W.* 3. *c.* 6. by § 5.—To suits in ecclesiastical courts for tithes in London, a prohibition is grantable. *Hob.* 11. 2 *Inst.* 659. So, where there is a suit in the ecclesiastical court for a modus, if the modus be denied, and the court proceeds, a prohibition shall be granted. *Palm.* 440. *Latch.* 210. *Noy.* 81. For the ecclesiastical court cannot try a custom or a prescription: and the reason applies to offerings when claimed by custom or prescription. *Serjt. Hill's MS. notes.*

(3) *Burdeaux* v. *Lancaster*, 1 *Salk.* 332. Exeter (Dean and Chapter's) case, 1 *Salk.* 334. *Wats. Cl. l.* 571.

These oblations were anciently due to the parson of the parish, that officiated at the mother church or chapel that had parochial rates; but if they were paid to other chapels that had not any parochial rates, the chaplains thereof were accountable for the same to the parson of the mother church. *Cod.* 427.

By the statute of circumspecte agatis, 13 Ed. 1. *If a parson demands of his parishioners oblations due and accustomed, such demand shall be made in the spiritual court; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

But Sir Simon Degge conceiveth, that an action also may be formed upon the statute at the common law. *Deg. p.* 2. *c.* 23. (4.)

However, it is certain, that by the small tithe act of the 7 & 8 *W. c.* 6. offerings, oblations, and obventions may be recovered before the justices of the peace.

[There are several other charities which were formerly converted into obligations and inforced by the canons of the church. Among them may be named the *kirk* or *church-shot*, which was a house-tax payable at the feast of St. Martin for that hearth where a person resided the preceding Christmas. (5.) The *plough alms* was 1*d.* for every plough land in the parish, and paid in 15 days after Easter. (6) The *leot-shot* or *light-shot* was payable thrice in a year, at Easter Eve, All Saints, and Candlemas, being a certain quantity of wax of about 1d. value for each hide of land. (7) The aggregate amount of all these perquisites, composed in each parish a fund which was devoted to nearly the same purposes as the revenues of the cathedral churches. (8)

Official.

OFFICIAL principal is an officer, whose office is usually annexed to that of *Chancellor;* and is therefore treated of under that title.

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(4) *Fruin* v. *Dean and Chapter of York,* 2 *Keb.* 778. *Andrews* v. *Symson,* 3 *Keb.* 523. 527.

(5) *Leges Canuti* in Wilkins's Ang. Sax. Leg. 130. *Leges Inæ Regis* I. by Wheloc.

(6) *Liber Constitutionum Temp. Æthelredi. R.* in Wilkins Leg. Ang. Sax. 114. Whitaker's Manchester, lib. ii. c. 11. 433.

(7) *Leg. Canuti R.* by Whiloc. 8. 12. Wilkins Leg. Ang. Sax. 130.

(8) Lingard's Antiquit. of the Ang. Sax. ch. 90.

There is also an official to the *archdeacon;* unto whom he standeth in the like relation, as the chancellor doth to the bishop.

Old Style. See Kalendar.
Option. See Bishops.
Oratory. See Chapel.

Ordinal.

ORDINAL, *ordinale*, was that book which *ordered* the manner of performing divine service: and seemeth to be the same which was called the *pie* or *portuis*, and sometimes *portiforium*. Lind. 251.

[24]

Ordinary.

ORDINARY, *ordinarius* (which is a word we have received from the civil law), is he who hath the proper and regular jurisdiction, as of course and of common right; in opposition to persons who are *extraordinarily* appointed. *Swinb.* 380.

In some acts of parliament we find the bishop to be called ordinary, and so he is taken at the common law, as having ordinary jurisdiction in causes ecclesiastical; albeit, in a more general acceptation, the word *ordinary* signifieth any judge authorised to take cognizance of causes in his own proper right as he is a magistrate, and not by way of deputation or delegation. *God.* 23.

Ordination.

I. *Of the order of priests and deacons in the church.*

II. *Of the form of ordaining priests and deacons, annexed to the book of common prayer.*

III. *Of the time and place for ordination.*

IV. *Of the qualification and examination of persons to be ordained.*

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I. *Of the order of priests and deacons in the church.* [25]

1. THE word *priest* is nearly the same in all christian languages; the Saxon is *preost*, the German *prister*, the Belgic *priester*, the Swedish *prest*, the Gallic *prestre*, the Italian *prete*, the Spanish *preste*; all evidently enough taken from the Greek πρεσβυτερος. *Jun. Etym.* — **Origin of the words priest and deacon.**

In like manner, the word *deacon*, with little variation, runneth through all the same languages; deduced from the Greek διακονος. *Id.*

2. *Art.* 35. Orders are not to be accounted for a sacrament of the gospel; as not having the like nature of sacraments with baptism and the Lord's supper; for that they have not any visible sign or ceremony ordained of God. — **Orders not a sacrament.**

3. It is evident unto all men diligently reading the holy scripture and ancient authors, that from the apostles' time there have been these orders of ministers in Christ's church; *bishops, priests,* and *deacons.* Which offices were evermore had in such reverend estimation, *that no man might presume to execute any of them, except he were first called, tried, and examined, and known* to have such qualities as are requisite for the same; and also by public prayer with *imposition of hands,* were approved and admitted thereunto by lawful authority. Preface to the forms of consecration and ordination. — **Antiquity of priests and deacons in the church.**

Bishops, priests, and deacons] Besides these, the church of Rome hath five others; viz. *subdeacons, acolyths, exorcists, readers,* and *ostiares.* 1. The *subdeacon,* is he who delivereth the vessels to the deacon, and assisteth him in the administration of the sacrament of the Lord's supper. 2. The *acolyth,* is he who bears the lighted candle whilst the gospel is in reading, or whilst the priest consecrateth the host. 3. The *exorcist,* is he who abjureth evil spirits in the name of Almighty God to go out of persons troubled therewith. 4. The *reader,* is he who readeth in the church of God, being also ordained to this, that he may preach

the word of God to the people. 5. The *ostiary*, is he who keepeth the doors of the church, and tolleth the bell. These, though some of them ancient, were human institutions, and such as come not under the limitation which immediately precedes [*from the apostles' time*]; for which reason, and because they were evidently instituted for convenience only, and were not immediately concerned in the sacred offices of the church, they were laid aside by our first reformers. *Gibs.* 99.

[26] *That no man might presume to execute any of them*] And to this purpose, the rule laid down in the canon law is, that if any person, not being ordained, shall baptize, or exercise any divine office, he shall for his rashness be cast out of the church, and never be ordained. *Gibs.* 138.

Except he were first called] Accordingly in the several offices, the person to be admitted is first examined by the archbishop or bishop, whether he thinks or is persuaded that he is truly called thereunto, according to the will of Christ, and the due order of this realm.

Tried, examined, and known] By the office of ordination, when the archdeacon or his deputy presenteth unto the bishop the persons to be ordained, the bishop says, "Take heed that "the persons whom you present unto us, be apt and meet for "their learning and godly conversation, to exercise their ministry "duly to the honour of God and the edifying of his church." To which he answereth, "I have enquired of them, and also "examined them, and think them so to be."

Imposition of hands] This was always a distinction between the three superior, and the five forementioned inferior orders; that the first were given by imposition of hands, and the second were not. *Gibs.* 99.

II. *Of the form of ordaining priests and deacons, annexed to the book of common prayer.*

Form established in the 2 Ed. 6.

1. In the liturgy established in the second year of king Edward the sixth, there was also a form of consecrating and ordaining of bishops, priests, and deacons; not much differing from the present form.

All other forms abolished.

2. Afterwards, by the 3 & 4 *Ed.* 6. *c.* 10. it was enacted, that *all books heretofore used for service of the church, other than such as shall be set forth by the king's majesty, shall be clearly abolished.* § 1.

Form annexed to the book of common prayer.

3. And by the 5 & 6 *Ed.* 6. *c.* 1. it is thus enacted: *The king, with the assent of the lords and commons in parliament, hath annexed the book of common prayer to this present statute; adding also a form and manner of making and consecrating of archbishops,*

bishops, priests, and deacons, to be of like force and authority as the book of common prayer. 5 & 6 Ed. 6. c. 1. § 5. 8 El. c. 1.

4. And by *Art.* 36. The book of consecration of archbishops and bishops, and ordering of priests and deacons, lately set forth in the time of Edward the sixth, and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecration and ordering; neither hath it any thing, that of itself is superstitious and ungodly. And therefore whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed king Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites; we declare all such to be rightly, orderly, and lawfully consecrated and ordered. Established by the 39 articles. [27]

5. And by *Can.* 8. Whosoever shall affirm or teach, that the form and manner of making and consecrating bishops, priests, and deacons, containeth any thing that is repugnant to the word of God; or that they who are made bishops, priests, or deacons in that form, are not lawfully made, nor ought to be accounted either by themselves or others to be truly either bishops, priests, or deacons, until they have some other calling to those divine offices; let him be excommunicated *ipso facto*, not to be restored, until he repent, and publicly revoke such his wicked errors. By canon.

6. And by the act of uniformity of the 13 & 14 *C.* 2. *c.* 4. it is enacted as followeth: *All ministers in every place of public worship shall be bound to use the morning and evening prayer, administration of the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the book annexed to this present act, and intituled,* The book of common prayer and administration of the sacraments, and other rites and ceremonies of the church of England, together with the psalter or psalms of David, pointed as they are to be sung or said in churches; and the form or manner of making, ordaining, and consecrating of bishops, priests, and deacons. § 2. By act of parliament.

And all subscriptions to be made to the thirty-nine articles shall be construed to extend (touching the said thirty-sixth article above recited) to the book containing the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons in this act mentioned, as the same did heretofore extend unto the book set forth in the time of king Edward the sixth. § 30, 31.

III. *Of the time and place for ordination.*

1. By *Can.* 31. Forasmuch as the ancient fathers of the church, led by example of the apostles, appointed prayers and fasts to be used at the solemn ordering of ministers; and to that purpose allotted certain times, in which only sacred orders might be given Time.

or conferred: we, following their holy and religious example, do constitute and decree, that no deacons or *ministers* be made and ordained, but only upon sundays immediately following *jejunia quatuor temporum*, commonly called ember weeks, appointed in ancient time for prayer and fasting (purposely for this cause at the first institution), and so continued at this day in the church of England.

And by the preface to the forms of consecration and ordination, it is prescribed, that the bishop may at the times appointed in the canon, or else upon urgent occasion on some other sunday or holiday in the face of the church, admit deacons and priests.

But this might not be done at other times than is directed by the canon, at the sole discretion of the bishop; but he was to have the archbishop's dispensation or licence, as the practice was: and this was understood to be a special prerogative of the see of Rome in the times of popery. But as the rubrick made in the time of king Edward the sixth, and continued in the last revisal of the common prayer, seems to leave it to the judgment of the bishop, without any direction to have recourse to the archbishop; it may be a question, whether such dispensation be now necessary. *Gibs.* 139.

Place. 2. And this to be done in the cathedral, or parish church where the bishop resideth. *Can.* 31.

So that the bishop's jurisdiction as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he shall reside; and the Irish bishops do sometimes ordain in England; but, regularly, leave ought to be obtained of the bishop, within whose diocese the ordination is performed. *Johns.* 34.

And this is agreeable to the rule of the ancient canon law; which directeth, that a bishop shall not ordain within the diocese of another, without the licence of such other bishop. *Gibs.* 139. (g)

IV. *Of the qualification and examination of persons to be ordained.*

Age. 1. By *Can.* 34. No bishop shall admit any person into sacred orders, except he, desiring to be a *deacon*, is three and twenty years old; and to be a *priest*, four and twenty years complete.

[29] And by the preface to the form of ordination: None shall be admitted a deacon, except he be twenty-three years of age, *unless he have a faculty;* and every man which is to be admitted a priest, shall be full four and twenty years old.

Unless he have a faculty] So that a faculty or dispensation is

(g) 6.* 3, 4. 37.

allowed, for persons of extraordinary abilities, to be admitted deacons sooner. *Gibs.* 145.

Which faculty (as it seemeth) must be obtained from the archbishop of Canterbury.

And by the statute of the 13 El. c. 12. *None shall be made* minister, *being under the age of four and twenty years.*

And in this case there is no dispensation. *Gibs.* 146.

Note, here it may be proper to observe once for all, the equivocal signification of the word *minister*, both in our statutes, canons, and rubrick in the book of common prayer. Oftentimes it is made to express the person officiating in general, whether priest or deacon; at other times it denoteth the priest alone, as contra-distinguished from the deacon, as particularly here in this statute, and in *Can.* 31. aforegoing. And in such cases, the determination thereof can only be ascertained from the connexion and circumstances.

E. 1 *Jac.* 2. *Roberts* and *Pain.* A person being presented to the parish-church of Christ-church in Bristol, was libelled against, because he was not twenty-three years of age when made deacon, nor twenty-four when made priest. A prohibition was prayed, upon this suggestion, that if the matter was true, a temporal loss, to wit, deprivation, would follow; and that therefore it was triable in the temporal court: But it was denied, because so it is also in the case of drunkenness and other vices, which are usually punished in the ecclesiastical courts, though temporal loss may ensue. 3 *Mod.* 67.

By the 44 *G.* 3. c. 43. it is enacted, that no person shall be admitted a deacon before he shall have attained the age of three and twenty years complete, and that no person shall be admitted a priest before he shall have attained the age of four and twenty years complete: and in case any person shall, from and after the passing of this act, be admitted a deacon before he shall have attained the age of three and twenty years complete, or be admitted a priest before he shall have attained the age of four and twenty years complete, that then and in every such case the admission of every such person as deacon or priest respectively, shall be merely void in law as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding, or enjoying, or being admitted to any personage, vicarage, benefice, or other ecclesiastical promotion, or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom: Provided always, that no title to confer or present by lapse shall accrue by any avoidance or deprivation, *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron. *s.* 1.

But nothing herein contained shall extend, or be construed to extend, to take away any right of granting faculties heretofore lawfully exercised, and which now be lawfully exercised by the archbishop of Canterbury, or the archbishop of Armagh, viz. to admit at earlier ages. *Ibid.*

Title. 2. *Otho.* Seeing it is dangerous to ordain any without a certain and true title; we do establish that before the conferring of orders by the bishop, a diligent search and inquiry be made thereof. *Ath.* 16.

Can. 33. It hath been long since provided, by many decrees of the ancient fathers, that none should be admitted either deacon or priest, who had not first some certain place where he might use his function: *According* to which examples we do ordain, that henceforth *no person* shall be admitted into sacred orders, [30] except (1) he shall at that time exhibit to the bishop, of whom he desireth imposition of hands, a presentation of himself to some ecclesiastical preferment then void in the diocese; or (2) shall bring to the said bishop a true and undoubted certificate, that either he is provided of some church within the said diocese where he may attend the cure of souls, or (3) of some minister's place vacant either in the *cathedral church* of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry; *or* (4) *that he is a fellow*, or in right as a fellow, or (5) to be a conduct or *chaplain in some college* in Cambridge or Oxford; or (6) except he be a *master of arts of five years' standing*, that liveth of his own charge in either of the universities; or (7) except by the bishop himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void. And if any bishop shall admit any person into the ministry that hath none of these titles, as is aforesaid; then he *shall keep and maintain him* with all things necessary, till he do prefer him to some ecclesiastical living: And if the said bishop shall refuse so to do, he shall be suspended by the archbishop, being assisted with another bishop, from giving of orders by the space of a year.

No person, &c.] By this branch of the canon, which is negative and exclusive, one sort of title that was heretofore very common, is in great measure taken away, viz. the title of his *patrimony*, which we meet with very frequently among the acts of ordination in our ecclesiastical records; and not only so, but the title of a *pension* or allowance in money, which is frequently specified; and sometimes the title of a *particular person* (of known abilities and there named) without any such specification of an annual sum. And at such titles, after the estate, sum, or the like, is often added in the acts of ordination (especially when it was small) that the party therewith acknowledged himself content; which declaration, so made and entered, was understood to be a dis-

charge of the bishop ordaining, from any obligation to provide for him. *Gibs.* 140.

In the cathedral church] This is only an affirmance of what was the law of the church before; the title of vicar *choral* being frequently entered as a canonical title, in the acts of ordination. *Gibs.* 140.

Or that he is a fellow] This also, as to fellows of colleges, appears to have been all along the law of the church of England, by the frequent entries of that title, as received and admitted in the acts of ordination. *Gibs.* 140.

Chaplain in some college] This seems to be a title founded on this canon, from the silence of the ancient books relating thereunto. *Gibs.* 140. [31]

Master of arts of five years' standing] This also seems to be a new title established by the canon. *Gibs.* 140.

Shall keep and maintain him] This was injoined by a canon of the third council of Lateran; which canon was taken into the body of laws made in a council held at London, in the year 1200. And in the time of archbishop Winchelsey, there is in the register an order from the archbishop to one of his comprovincial bishops, to provide one of a benefice, whom he had ordained without title; and a citation of the executors of a bishop deceased, to oblige them to provide for one, whom the bishop had so ordained; and there is an order to a bishop, to oblige a clergyman, who had given a title of a certain annual sum, to pay it till the clerk should be provided for; and a citation to Merton college, to show cause, why they should not be obliged to maintain one, to whom they had given a title at his ordination. In like manner, the observation of this canon made in the year 1603 (or rather of the common law of the church of which this canon is only an affirmance) was specially inforced upon the bishops by king Charles the first and archbishop Laud, upon this pain or penalty of maintaining the person, if they should ordain any without such title. And in ancient times, the names of the persons who granted the titles were entered in the acts of ordination, as standing engaged; as a testimony against the person intitling, in case the clerk (ordained upon such title) should at any time want convenient maintenance. *Gibs.* 141.

And whereas the laws of the church in this particular might be eluded, by a promise on the part of the person ordained, not to insist upon such maintenance; we find that case considered in the ancient Gloss, and there it seems to be determined, that the same being a public right cannot be released. And before that, it had been made part of the body of the canon law, that persons having made such promise, unless compassionately dispensed withal, ought not to be admitted to a higher order, nor to minister in the order already taken. *Id.*

In case of *letters dismissory*, the rule of the canon law is, that the bishop whose business it was to see that there was a good
[32] title, shall be liable to the penalty for a person ordained without sufficient title, although another bishop ordained such person. *Id.*

Testimonial. 3. By a constitution of *Otho*, it is thus injoined: Seeing it is dangerous to ordain persons unworthy, void of understanding, illegitimate, irregular, and illiterate; we do decree, that before the conferring of orders by the bishop, strict search and inquiry be made of all these things. *Athon.* 16.

And by a constitution of archbishop *Reynolds*; no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having *canonical impediment*, shall be admitted into holy orders. *Lind.* 33.

Canonical impediment] As suppose, of *bigamy*; or any other which proceeds rather from defect than crime. *Id.*

And by several constitutions of *Edmund* archbishop, the following impediments and offences are declared to be causes of suspension from orders received, and consequently so far forth are objections likewise, if known beforehand, against being ordained at all; viz.

They who are born of not lawful matrimony, and have been ordained without dispensation; shall be suspended from the execution of their office, till they obtain a dispensation:

They who have taken holy orders, in the conscience of any mortal sin, or for temporal gain only; shall not execute their office, till they shall have been expiated from the like sin by the sacrament of penance.

Again; all who appear to have contracted *irregularity* in the taking of orders, or before or after, unless dispensed withal by those who have power to dispense with the same, shall be suspended from the execution of their office, until they shall have lawful dispensations: By *irregulars* as to the premises, we understand homicides, advocates in causes of blood, simonists, makers of simoniacal contracts, and who being infected with the contagion, have knowingly taken orders from heretics, schismatics, or persons excommunicated by name.

Also bigamists, husbands of lewd women, violators of virgins consecrated to God, persons excommunicate, and persons having taken orders surreptitiously, sorcerers, burners of churches, and if there be any other of the like kind.

And he who did examine the parties, was to inquire into all these particulars. *Lind.* 26.

[33] But this is not now required; but all the same so far as they concern a man's capacity, learning, piety, and virtue, are included in the following directions in the preface to the form of ordaining deacons, which is in some degree an enlargement of the foregoing restrictions: viz.

The bishop knowing, either by himself, or by sufficient testimony, any person to be a man of virtuous conversation, and without crime; and after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in holy scripture, may admit him a deacon.

And by *Can.* 34. the direction is this: No bishop shall admit any person into sacred orders, except he hath taken some degree of school in either of the two universities; or at the least, except he be able to yield an account of his faith in Latin according to the thirty-nine articles.

And with respect unto *priest's* orders in particular, it is thus directed by the statute of the 13 *El. c.* 12. *None shall be made* minister, *unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the thirty-nine articles; nor unless he be able to answer, and render to the ordinary an account of his faith in Latin, according to the said articles, or have special gift or ability to be a preacher.*

So that if these requisites be observed, those others are not now required, further than they fall in with these.

And the ordinary way by which all this must appear to the bishop, must be by a written testimonial; concerning which it is directed by *Can.* 34. aforesaid, with respect both unto deacon's and priest's orders, that no bishop shall admit any person into sacred orders, except he shall *then exhibit letters testimonial of his good life and conversation, under the seal of some college of* Cambridge *or* Oxford, *where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for the space of three years next before.*

And with respect unto *priest's* orders in particular, it is enacted by the aforesaid statute of the 13 *El. c.* 12. that *none shall be made* minister, *unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life, and of his professing the doctrine expressed in the thirty-nine articles.*

Some of the canons abroad do further require, that proclamation be thrice made in the parish church where the person who offereth himself to be ordained inhabiteth, in order to know the impediments if any be; which the minister of such parish is to certify to the bishop or his official: Particularly, the council of Trent requires this, and that it be done by the command [34] of the bishop, upon signification made to him, a month before, of the name of the person who desires to be ordained: Not unlike to which is this clause in the articles of queen Elizabeth published in the year 1564, viz. "against the day of giving "orders appointed, the bishop shall give open monitions to all

"men, to except against such as they know not to be worthy, "either for life or conversation." *Gibs.* 147.

Agreeable unto which are archbishop *Wake*'s directions to the bishops of his province in the year 1716, subjoined at the end of this title, which although they have not the authority of a *law* properly so called, yet since it is said to be discretionary in the bishop whom he will admit to the order of priest or deacon, and that he is not obliged to give any reason for his refusal (1 *Still.* 334. 1 *Johns.* 46. *Wood, b.* 1. *c.* 3.), this implieth, that he may insist upon what previous terms of qualification he shall think proper, consistent with law and right. And by the statute, rubrick, and canon aforegoing, he is not required, but permitted only, to admit persons so and so qualified; and prohibited to admit any without, but not injoined to admit any persons although they have such and such qualifications.

Examination. 4. By *Can.* 35. The bishop, before he admit any person to holy orders, shall diligently examine him, in the presence of those ministers that shall assist him at the imposition of hands; and if the bishop have any lawful impediment, he shall cause the said ministers carefully to examine every such person so to be ordered. And if any bishop or suffragan shall admit any to sacred orders who is not so examined, and qualified as before we have ordained [viz. in *Can.* 34.]; the archbishop of his province having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests for the space of two years.

Of common right, this examination pertaineth to the archdeacon, saith *Lindwood;* and so saith the canon law, in which this is laid down, as one branch of the archidiaconal office. Which thing is also supposed in our own form of ordination, both of priests and deacons, where the archdeacon's office is to present the persons that are apt and meet. *Gibs.* 147.

[35] And for the regular method of examination, we are referred by *Lindwood,* to the canon upon that head, inserted in the body of the canon law; viz. When the bishop intends to hold an ordination, all who are desirous to be admitted into the ministry, are to appear on the fourth day before the ordination; and then the bishop shall appoint some of the priests attending him, and others skilled in the divine law, and exercised in the ecclesiastical sanctions, who shall diligently examine the life, age, and title of the persons to be ordained; at what place they had their education; whether they be well learned; whether they be instructed in the law of God. And they shall be diligently examined for three days successively; and so on the Saturday, they who are approved, shall be presented to the bishop. *Gibs.* 147. (*h*)

(*h*) See *Dist.* 24. *c.* 5.

5. By a constitution of archbishop *Reynolds*; Persons of religion shall not be ordained by any but their own bishop, without letters dimissory of the said bishop; or, in his absence, of his vicar-general. *Lind.* 32. Letters dimissory.

And by *Can.* 34. No person shall henceforth admit any person into sacred orders, which is not of his own diocese, except he be either *of one of the universities* of this realm, or except he shall bring letters dimissory from the bishop of whose diocese he is.

Of one of the universities.] That is, a member of some college, so as that he may be ordained *ad titulum collegii sui*. *Grey*, 45.

In the ancient acts of ordination, the fellows of New-college, St. Mary Winton, and King's college in Cambridge, are mentioned, as possessed of a special privilege from the pope, to be ordained by what bishops they pleased; and they are said to be *sufficienter dimissi*, in virtue of that privilege, and without letters dimissory. But it doth not appear by our books, that this was then that general right of all colleges in the two universities, to which they are entitled by virtue of this canon. *Gibs.* 142.

And by a constitution of *Richard Wethershead*, archbishop of Canterbury; a bishop ordaining one of another diocese, without special licence of the bishop of that diocese, shall be suspended from the conferring of that order to which he shall ordain any such person, until he shall have made a proper satisfaction. *Lind.* 32.

And by *Can.* 35. If any bishop or suffragan shall admit any to sacred orders, who is not so qualified—as before we have ordained; the archbishop of his province, having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests, for the space of two years: (and by the ancient canon law, from granting letters dimissory to the persons of his diocese who are to be ordained. *Gibs.* 143.) [36]

And they who shall be promoted to holy orders, by other than their own bishop, without licence of their own bishop, shall be suspended from the exercise of such order, until they shall obtain a dispensation. *Edm. Lindw.* 26.

But a dispensation in such case by their own bishop shall be sufficient, who may ratify such ordination. *Lindw.* 26.

And in our ecclesiastical records, we find several persons dispensed with, in form, for obtaining orders without such letters, as a great irregularity; which was looked upon as needful for the ratification of the order received. *Gibs.* 142.

The *archbishop*, as metropolitan, may not grant letters dimissory; but this is to be understood with an exception to the time of his metropolitical visitation of any dioceses, during which he may both grant letters dimissory, and ordain the clergy of the diocese visited. *Gibs.* 143.

So neither the *archdeacon*, nor *official*, may grant letters dimissory. Concerning the *archdeacon*, the canon law is express: And as to the *officials*, they are excluded by the same constitution that excludes the religious; and the ancient gloss, speaking of officials, says, although it cannot be denied that they have ordinary jurisdiction, yet recourse is not to be had to them in every thing—for they cannot grant letters commendatory for orders. *Gibs.* 143.

During the *vacancy* of any see, the right of granting letters dimissory within that see, rests in the guardian of the spiritualties; and in consequence, the right of ordaining also, where such guardian is of the episcopal order. *Gibs.* 143.

A bishop being in parts *remote*, he who is specially constituted vicar-general for that time, hath power to grant letters dimissory; and the reason is, because during that time the whole episcopal jurisdiction is vested in him; as it is also in persons who enjoy jurisdictions entirely exempt from the bishop, and who therefore may likewise grant them. *Gibs.* 143.

[37] The persons *to whom* letters dimissory may be granted by any bishop, are either such who were born in the dioceso, or, are promoted in it, or are resident in it. This appears from *Lindwood*, in his commentary upon the foregoing constitution of archbishop *Reynolds*; whose observation is taken from the body of the canon law. But although this is laid down disjunctively, so as letters dimissory granted in any of the three cases will be good; yet it appears in practice, that heretofore they were judged to come more properly from the bishop in whose diocese he was promoted, or in which his title lay. And the reason was, because the bishop in whose diocese the person was born, or had long dwelt, is presumed to have the best opportunity of knowing the conversation of the person to be ordained. *Gibs.* 143.

The *fitness* of the person to be ordained (as to life, learning, title, and the like) ought to appear, before the granting of letters dimissory. This is supposed (as to conversation at least) in what hath been said before; and as to the title it was not only inquired into by the bishop granting the letters, but frequently remained with him; of which special notice was taken in the body of such letters. And the bishop who grants the letters dimissory is to make this inquiry, and not the bishop to whom such letters are transmitted; for he is to presume that the persons recommended to him are fit and sufficient. *Gibs.* 144.

Letters dimissory may be granted at once to *all orders*, and directed to any catholic bishop at large. And this hath been the practice in the church of England, both before and since the Reformation; as appears by innumerable instances, in the acts of ordination, of *literæ dimisoriæ ad omnes*; and by the forms of the letters dimissory (whether *ad omnes* or not) which are di-

rected in that general style. But other churches, to prevent the inconveniences of this practice (especially where such letters are granted without previous examination), have expressly forbid them both. *Gibs.* 144.

V. *Of oaths and subscriptions previous to the ordination.*

1. By the 1 *El. c.* 1. and 1 *W.* 3. *c.* 8. *Every person taking orders, before he shall receive or take any such orders shall take the oaths of allegiance and supremacy, before the ordinary or commissary.*

2. And by the 13 *El. c.* 12. *None shall be admitted to the order of deacon, or ministry; unless he shall first subscribe to all the articles of religion agreed upon in convocation in the year* 1562, *which only concern the confession of the true Christian faith and the doctrine of the sacraments.* § 5. [38]

3. And by *Can.* 36. No person shall be received into the ministry, except he shall first subscribe to these articles following.

(1) That the king's majesty, under God, is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state or potentate hath, or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.

(2) That the book of common prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully be used, and that he himself will use the form in the said book prescribed in public prayer, and administration of the sacraments, and none other.

(3) That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our Lord God one thousand five hundred sixty and two; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the word of God.

Which subscription, as it seemeth by the same and the following canon, must be before the bishop himself.

And for the avoiding of all ambiguities, such person shall subscribe in this form and order of words, setting down both his Christian and sirname, viz., "I N. N. do willingly and *ex animo* "subscribe to these three articles above mentioned, and to all "things that are contained in them." *Can.* 36.

And if any bishop shall ordain any, except he shall first have

so subscribed; he shall be suspended from giving of orders for the space of twelve months. *Can.* 36.

VI. *Form and manner of ordaining deacons.*

1. The ordination (as well of deacons as of ministers) shall be
[39] performed in the time of divine service, in the presence not only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave persons, being masters of arts at the least, and allowed for public preachers. *Can.* 31.

And by the statute of the 21 *H.* 8. *c.* 13. for pluralities; it is alleged as one reason why a bishop may retain six chaplains, because he must occupy six chaplains at the giving of orders. § 24.

However, in practice, a less number than is required either by the said statute or by the aforesaid canon, is sometimes admitted; and this (as it is said,) by virtue of the rubrick in the office of ordination, which directeth *that the bishops with the priest present shall lay their hands upon the persons to be ordained;* implying, as is supposed, that if there are but two priests present, it sufficeth by this rubrick, which is established by the act of parliament of the 13 & 14 *C.* 2. But the words do not seem so much to be restrictive of the number before required, as directory what the number as by law before required in this respect shall do.

2. And at the time of ordination, the bishop shall say unto the people, Brethren, if there be any of you who knoweth any impediment, or notable crime, in any of these persons presented to be ordered deacons, for which he ought not to be admitted to that office; let him come forth in the name of God, and shew what the crime or impediment is. *Form of Ordination.*

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime. *Id.*

3. And before the gospel, the bishop sitting in his chair, shall cause the said oaths of allegiance and supremacy to be (again) ministered unto every of them that are to be ordered. *Id.* 1 *W. c.* 8. (*i*)

(*i*) The 24 *G.* 3. *c.* 35. after reciting "that, by the laws of the "realm, persons who are admitted into holy orders must take the "oath of allegiance; and that there are divers subjects of foreign "countries desirous that the word of God and the sacraments should "be administered to them, according to the liturgy of the church of "England, by subjects or citizens of the said countries, ordained

4. Then the bishop, laying his hands severally upon the head of every one of them, humbly kneeling before him, shall say,

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" according to the form of ordination in the church of England," empowers the bishop of London, or any other bishop to be by him appointed, to admit to the order of deacon or priest, for the purposes aforesaid, persons, subjects, or citizens of countries out of his majesty's dominions, without requiring them to take the said oath of allegiance. But they are not to exercise their office within his majesty's dominions; and this exemption from taking the above oath is to be mentioned in their testimonial. For the consecration of bishops under similar circumstances, see *tit.* Bishops, II. 17.

[So by 59 *G.* 3. *c.* 60. § 1. after reciting that " whereas it is expe-" dient that the archbishops and bishops of this realm should from " time to time admit into holy orders persons specially destined for " the cure of souls in H. M.'s foreign possessions, *although such per-" sons may not be provided with the title required by the canon of the " church of England of such as are to be made ministers:* and whereas " it will greatly tend to the advancement of religion within the same " that due provision shall be regularly made for a supply of persons " properly qualified to serve as parsons, vicars, curates or chaplains." The above archbishops, or the bishop of London, or any bishop authorised by any or either of them, may admit to the holy orders of deacon or priest, any person whom on examination he shall deem duly qualified specially for the purpose of taking on himself the cure of souls or officiating in any spiritual capacity *in H. M.'s colonies or foreign possessions*, and residing therein; and a declaration of and written engagement to perform such purpose, under the hand of such person, being deposited in the hands of such archbishop, &c. shall be held a sufficient title with a view to such ordination: and it shall be distinctly stated in his letters of ordination, that he has been ordained for cure of souls in H. M.'s foreign possessions. § 1.

No person so admitted into holy orders for these purposes, shall be capable of holding or of being admitted to any benefice or other ecclesiastical dignity soever within the U. K., or of acting as curate therein, without the previous consent and approbation in writing under hand and seal of the bishop of the diocese, in which any such benefice, &c. is locally situate, nor without like consent, &c. of such one of the said archbishops or bishop of London by whom or by whose authority he has been originally ordained; or in case of the demise or translation of such archbishop or bishop, of his successor in the same see; provided that no such consent, &c. shall be given unless the applicant first produces a testimony of his good behaviour during his residence abroad from the bishop in whose diocese he has officiated, or if no such bishop, from the governor in council of the colony in which he may have been resident, or from the colonial secretary of state. § 2. By § 3. no person admitted into holy orders by bishops of Quebec, Nova Scotia, or Calcutta, or by any other bishop or archbishop than those of England or Ireland, shall be capable of officiating in any church or chapel of England or Ireland without special permission from the archbishop of the province where he proposes to officiate: or of holding or being admitted to any ecclesi-

"Take thou authority to execute the office of a deacon in the "church of God committed unto thee; in the name of the Fa-"ther, and of the Son, and of the Holy Ghost. Amen."

Then shall the bishop deliver to every one of them the New Testament, saying, "Take thou authority to read the gospel in "the church of God, and to preach the same if thou be thereto "licensed by the bishop himself." *Form of Ordin.*

5. Finally, it must be declared unto the deacon, that he must continue in that office of a deacon the space of a whole year (except for reasonable causes it shall otherwise seem good unto the bishop), to the intent he may be perfect, and well expert in the things appertaining to the ecclesiastical administration; in executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood. *Id.*

VII. *Form and manner of ordaining priests.* (9)

1. *Can.* 32. The office of a deacon being a step or degree to the ministry, according to the judgment of the ancient fathers and

astical preferment in England or Ireland, or acting as curate therein, without consent and approbation of the archbishop and of the bishop of the diocese wherein any such preferment or curacy is situate. And by § 4, 5. no person after 2d July, 1819, ordained deacon or priest by a colonial bishop, who at the time of such ordination did not actually possess episcopal jurisdiction over some diocese, district or place, or was not actually resident therein, shall be capable of at any time holding preferment within H. M.'s dominions, or of being stipendiary curate or chaplain, or of officiating in any place or manner as a minister of the established church of England and Ireland. And all admissions, inductions, and appointments to curacies made contrary to this act shall be void.]

(9) The wardens of a charity school were by the statutes to nominate a master being in priest's orders, in 60 days; on default, the dean and chapter of York to appoint in 30 days; and then the bishop. Defendants nominated *R.* not in priest's orders, and the bishop sent notice to the chapter, who not appointing within 30 days, the bishop appointed *C.* who resigned into the hands of the warden, who within five days again appointed *R. then* in priest's orders. This case depends on the right of *R.*; his not being in priest's orders was an objection not to be dispensed with. But then *what are priest's orders?* The subsequent statutes shew such orders were meant as capacitated the person for saying mass; which now signifies, performing the service according to the liturgy. The second nomination of *R.* was valid on resignation of *C.*, for the wardens were then as much patrons as at first. This is not within the reason of a lapse; and the bishop was wrong in his notice, for he should have sent a copy of the statutes to the chapter. Notice must be given of the fact, but not of the foundation of a right; as, upon notice of an avoidance, the patron

the practice of the primitive church, we do ordain and appoint, that hereafter no bishop shall make any person, of what qualities or gifts soever, a deacon and a minister both together upon one day; but that the order in that behalf prescribed in the book of making and consecrating bishops, priests, and deacons, be strictly observed. Not that always every deacon should be kept from the ministry for a whole year, when the bishop shall find good cause to the contrary; but that there being now four times appointed in every year for the ordination of deacons and ministers, there may ever be some time of trial of their behaviour in the [41] office of deacon, before they be admitted to the order of priesthood.

2. At the time of ordination, the bishop shall say unto the people: Good people, these are they whom we purpose, God willing, to receive this day unto the holy office of priesthood: for after due examination, we find not to the contrary; but that they be lawfully called to their function and ministry, and that they be persons meet for the same. But yet if there be any of you, who knoweth any impediment, or notable crime in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of God, and shew what the crime or impediment is.

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime. *Form of Ordin.*

3. Then the bishop, sitting in his chair, shall minister to every one of them the oaths aforesaid of allegiance and supremacy. *Id.* 1 *W.* c. 8. (*k*)

4. Then the bishop, *with the priests present*, shall lay their hands severally upon the head of every one that receiveth the order of priesthood; the receivers humbly kneeling upon their knees, and the bishop saying, "Receive the Holy Ghost for the "office and work of a priest in the church of God, now com-"mitted unto thee by the imposition of our hands: Whose sins "thou dost forgive, they are forgiven; and whose sins thou dost "retain, they are retained. And be thou a faithful dispenser of "the word of God, and of his holy sacraments: In the name "of the Father, and of the Son, and of the Holy Ghost."

Then the bishop shall deliver to every one of them kneeling, the Bible into his hand, saying, "Take thou authority to preach

must look to all consequences. Lord Ch. said this was not like a presentation, because the bishop could not revoke it, which the king before induction or a subject before institution might do. Defendants having a right and relator none, his bill was dismissed with costs. *Atto. Gen.* v. *Wycliffe*, 1 *Ves.* 80.

(*k*) *Vid. supra*, VI. 3.

"the word of God, and to minister the holy sacraments in the, "congregation, where thou shalt be lawfully appointed there-"unto."

With the priests present.] By *Can.* 35. They who assist the bishop in laying on of hands, shall be of the cathedral church, if they may be conveniently had, or other sufficient preachers of the same diocese, to the number of three at the least.

[42] VIII. *Fees for ordination.*

1. By a constitution of archbishop *Stratford:* For any letters of orders, the bishop's clerks or secretaries shall not receive above 6*d.*; and for the sealing of such letters, or to the *marshals of the bishop's house* for admittance, to *porters, hostiaries,* or *shavers,* nothing shall be paid: on pain of rendering double within a month; and for default thereof, the offender, if he is a clerk beneficed, shall be suspended from his office and benefice; if he is not beneficed, or a lay person, he shall be prohibited from the entrance of the church till he comply. *Lind.* 222.

Marshals.] They who govern the hall and inner parts of the house. *Lind.* 222.

Hostiaries.] Lindwood understandeth this word to signify the same as *ostiaries,* or persons appointed to keep the *doors,* and the word *janitores* (*porters*) next aforegoing to signify those who keep the *gates;* whereas more properly, it seemeth that *janitores* (or *porters*) doth express both of these; and that the word *hostiarij* (as Dr. *Gibson* observeth) doth denote those persons who prepared the *host;* for there is in the Roman pontifical a rubrick in the ordination of priests, that the bishop shall deliver to the person to be ordained, the cup with wine and water, and the paten laid upon it with the host, the bishop saying unto him, Take thou authority to offer sacrifice to God, and to celebrate mass as well for the living as for the dead, in the name of God. *Gibs.* 153.

Shavers.] Whose office was to shave the crowns of persons to be ordained. *Lind.* 222.

2. And by *Can.* 35. No fee or money shall be received either by the archbishop or any bishop or suffragan, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop, bishop or suffragan, for parchment, writing, wax, sealing, *or any other respect thereunto appertaining,* take above 10*s.*: under such pains as are already by law prescribed.

Or any other respect thereunto appertaining ——— above 10*s.*] It is not lawful, saith *John de Athon,* to give any thing to the notary performing the duty of his office in the act of ordination; nevertheless, he says, it is otherwise as to that notary or register who writes letters testimonial for those that are ordained, for his

just salary, or somewhat more for his extraordinary trouble; although this may more securely be given voluntarily, without a preceding compact. *Otho. De scrutin. ordin.* v. *Scriptura. Athon.* 16. [43]

And some of the modern constitutions abroad agreeing to the reasonableness of this, have, by way of restraint upon the officer, fixed the fee of writing and the other particulars, in like manner as this canon and the foregoing constitution of archbishop *Stratford* have done in our church. For the *letters testimonial* of ordination are no part of the ordination, but only taken afterwards for the security of the person ordained; and therefore the same *John de Athon,* in the place above mentioned, says, It is *safe* (not, *necessary*) for the persons ordained to have with them the said writing or letters testimonial of ordination, under the bishop's seal, containing the names of the person ordaining and of the person ordained, and the taking of such orders, and the time and place of ordination, and the like. *Gibs.* 154.

IX. *Simoniacal promotion to orders.* — [See Simony.]

By the 31 *El. c.* 6. *If any person shall receive or take any money fee reward or any other profit directly or indirectly, or shall take any promise agreement covenant bond or other assurance to receive or have any money fee reward or any other profit directly or indirectly, either to himself or to any other of his friends, (all ordinary and lawful fees only excepted,) for or to procure the ordaining or making of any minister, or giving of any orders or licence to preach; he shall forfeit* 40*l. and the person so corruptly ordained* 10*l.; and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept any benefice or promotion ecclesiastical, the same shall be void immediately upon his induction investiture or installation, and the patron shall present or collate or dispose of the same as if he were dead: one moiety of which forfeitures to be to the king, and the other to him that shall sue.* § 10.

X. *General office of deacons.*

It appertaineth to the office of a deacon, in the church where he shall be appointed to serve, *to assist the priest in divine service, and specially when he ministereth the holy communion,* and to help him in the distribution thereof, *and to read the holy scriptures,* and homilies in the church; and to instruct the youth in the [44] catechism; in the absence of the priest to baptize infants; and to preach if he be licensed thereto by the bishop himself: And furthermore it is his office, where provision is so made, *to search for the sick poor and impotent* people of the parish, *and to inti-*

mate their estates names and places where they dwell, unto the curate; that by his exhortations they may be relieved with the alms of the parishioners or others. *Rubr. in the form of ordin.*

To assist the priest in divine service.] Anciently, he officiated under the presbyter, in saying responses and repeating the confession, the creed, and the Lord's prayer after him, and in such other duties of the church as now properly belong to our parish clerks, who were heretofore real clerks, attending the parish priest in those inferior offices. *Gibs.* 150.

And specially when he ministereth the holy communion.] But by the 13 & 14 *C.* 2. *c.* 4. No person shall presume to *consecrate* the sacrament of the Lord's supper, before such time as he shall be ordained priest; on pain of 100*l.*, half to the king, and half to be equally divided between the poor of the parish where the offence shall be committed and him who shall sue in any of his majesty's courts of record; and to be disabled from being admitted to the order of priest for one whole year then next following. § 14.

But this not to extend to foreigners or aliens of the foreign reformed churches allowed by the king. § 15.

Also, by the act of toleration this shall not extend to qualified protestant dissenting ministers.

And to read the holy scriptures.] This power is expressly given to him in the act of ordination before mentioned.

To search for the sick, poor, and impotent.] This is the most ancient duty of a deacon, and the immediate cause of the institution of the order. This rule was made in England while the poor subsisted chiefly by voluntary charities, and before the settlement of rates or other fixed and certain provisions; pursuant to which provision, our laws have devolved that care upon the churchwardens and overseers of the poor; which last office was created on purpose for that end. *Gibs.* 159.

And to intimate their estates, names, and places where they dwell, unto the curate.] That is, to the rector or vicar, who hath the *cure* of souls.

And here it is obvious to remark the ambiguity of the word *curate*, as was before observed of the word *minister:* sometimes
[45] it expresseth the person, whether priest or deacon, who officiateth under the rector or vicar, employed by him as his assistant, or to supply the place in his absence; sometimes it denoteth the person officiating in general, whether he be rector, vicar, or assistant curate, or whosoever performeth the service for that time; sometimes it denoteth exclusively (as in this place) the rector, vicar, or person beneficed, who hath *curam animarum*.

So far the office of a deacon is to be collected from the rubrick in the form of ordination, and from the form itself. And forasmuch as he is hereby permitted to baptize, to catechize, to preach, to assist in the administration of the Lord's supper; so

also by parity of reason he hath used to solemnize matrimony, and to bury the dead. *Wats. c.* 14.

And in general it seemeth, that he may perform all the other offices in the liturgy, which a priest can do, except only consecrating the sacrament of the Lord's supper (as hath been said), and except also the pronouncing of the *absolution.*

Indeed it it not clear from the rubrick in the book of common prayer, whether, or how far, a deacon is prohibited thereby to pronounce the absolution. For although it is there directed, that the same shall be pronounced by the *priest alone;* yet the word [*alone*] in that place seemeth only to intend, that the people shall not pronounce the absolution after the priest, as they did the confession just before: and the word *priest,* throughout the rubrick, doth not seem to be generally appropriated to a person in priest's orders only; on the contrary, almost immediately after it is directed, that the *priest* shall say the gloria patri, and then afterwards that the *priest* shall say the suffrages after the Lord's prayer (which, by the way, in most of the occasional offices are called by mistake the suffrages *after the creed,* or the suffrages *next after the creed*), and it is not supposed that these expressions are to be understood of the *priest* alone, exclusive of a deacon who may happen to perform the service. And here also we may observe the ambiguous signification of the word *priest,* as before was observed of the words *minister* and *curate;* sometimes it is understood to signify a person in priest's orders only; at other times, and especially in the rubrick, it is used to signify the person officiating, whether he be in priest's or only in deacon's orders: and in general, the words *priest, minister,* and *curate,* seem indiscriminately to be applied throughout the liturgy, to denote the clergyman who is officiating, whether he [46]
be rector, vicar, assistant curate, priest, or deacon.

But the argument to evince that the priest only, and not a deacon, hath power to pronounce the absolution, seemeth most evidently to be deduced from the acts of ordination before mentioned. To the *deacon,* it is said, "Take thou authority to "read the gospel, and to preach:" To the *priest,* it is said, "Receive the Holy Ghost —— Whose sins thou dost forgive, "they are forgiven; and whose sins thou dost retain, they are "retained."

Moreover; until a person is admitted to the order of priesthood, he is not capable of any benefice or ecclesiastical promotion. *Gibs.* 146. (*l.*)

(*l*) Dr. Gibson refers to the 13 *E. c.* 12. which enacts, that no person shall be admitted to any benefice unless he be of the age of three and twenty years, and a deacon at the least; and directs that every person admitted to a benefice with cure shall be admitted to

And by the statute of the 13 & 14 *C.* 2. *c.* 4. No person shall be capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity, before he be ordained priest; on pain of 100*l.*; half to the king, and half to be equally divided between the poor and the informer. § 14.

Neither is a person that is merely a layman, or that is only a deacon, capable of a *donative:* for although he who hath a donative may come into the same by lay donation, and not by admission and institution; yet his function is spiritual. 1 *Inst.* 344.

So that he who is no more than a deacon, can only use his orders either as a chaplain to some family, or as a curate to some priest, or as a lecturer without title; for the prebendaries of some prebends in cathedral and collegiate churches, are to read lectures there, by the appointment of the founders thereof, and may from thence be called lecturers; but these places are of the
[47] number of ecclesiastical promotions, to which the incumbents are admitted by collation or institution, of which a deacon as aforesaid is not therefore capable; yet the king's professor of the law within the university of Oxford, may have and hold the prebend of Shipton within the cathedral church of Sarum, united and annexed to the place of the same king's professor for the time being, although that the said professor be but a layman. *Wats.* *c.* 14. 13 & 14 *C.* 2. *c.* 4. § 20.

XI. *General office of priests.*

A priest by his ordination receiveth authority to preach the word of God, and to consecrate and administer the holy communion, in the congregation where he shall be lawfully appointed thereunto.

Yet, notwithstanding, by *Can.* 36. he may not preach without a licence either of the archbishop, or of the bishop of the diocese where he is placed, under their hands and seals, or of one of the two universities, under their seals likewise.

But a licence by the bishop of any diocese is sufficient, although it be only to preach within his diocese; the statute not

minister the sacraments within one year after his induction, if he be not so admitted before, under pain of deprivation. See Deprivation, in *not.* But the 13 & 14 *C.* 2. *c.* 4. § 14., extends the restriction by declaring, that no person shall be capable to be admitted to any benefice, nor to administer the sacrament, before such time as he shall be ordained *priest,* according to the form prescribed by the book of common prayer, under the penalty of 100*l.*, and disability to be admitted into the order of priest for the space of one year next following. *Wats.* p. 142.

requiring any licence by the bishop of the diocese where the church is. *Wats. c.* 14.

Dr. Watson says, that if a person, who is a mere layman, be admitted and instituted to a benefice with cure, and doth administer the sacrament, marry and the like; these, and all other spiritual acts performed by him during the time he continues parson in fact, are good; so that the persons baptized by him are not to be rebaptized, nor persons married by him to be married again, to satisfy the law. *Wats. c.* 14. *Cro. El.* 775.

XII. *Exhibiting letters of orders.*

1. *Can.* 137. Every parson, vicar, and curate, shall at the bishop's first visitation, or at the next visitation after his admission, shew and exhibit unto him his letters of orders, to be by him either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be signed by the register; the whole fees for which, to be paid but once in the whole time of every bishop, and afterwards but half the said fees.

2. *Arynd.* No curate shall be admitted to officiate in another diocese, unless he bring with him his letters of orders. *Lindw.* 48.

3. *Can.* 39. No bishop shall institute any to a benefice, who hath been ordained by any other bishop, except he first shew [48] unto him his letters of orders.

4. By the 4 *H.* 7. *c.* 13. If any person, at the second time of asking his clergy, because he is within orders, hath not there ready his letters of orders, or a certificate of his ordinary witnessing the same; the justices afore whom he is arraigned, shall give him a day to bring in his said letters or certificate; and if he fail in so doing, he shall lose the benefit of his clergy, as he shall do that is without orders.

XIII. *Archbishop* Wake's *directions to the bishops of his province in relation to orders.*

It is judged proper here to subjoin archbishop *Wake*'s letter to the bishops of the province of Canterbury, dated June 5, 1716, which, although it concerneth other matters besides those of ordination, yet since the due conferring of orders appeareth to be the principal regard thereof, it seemeth best to insert the same intire in this place; and to refer to it here at large from those other titles, unto which it hath some relation.

As to its authority, it is certain (as hath been observed before) that in itself it hath not the force of law, nor is it so intended, or to be of any binding obligation to the church, further than the archbishops and bishops from time to time shall judge expedient; I mean, as to those parts of it which only concern matters that

the law hath left indefinite, and discretionary in the archbishops and bishops. Other parts thereof are only inforcements of what was the law of the church before; and those, without doubt, are of perpetual obligation: not by the authority of these injunctions, but by virtue of the laws upon which they are founded.

My very good lord,

Being by the providence of God called to the metropolitical see of this province, I thought it incumbent upon me to consult as many of my brethren, the bishops of the same province, as were here met together during this session of parliament, in what manner we might best employ that authority which the ecclesiastical laws now in force, and the custom and laws of this realm, have vested in us, for the honour of God, and for the edification of his church, committed to our charge: And upon serious consideration of this matter, we all of us agreed in the same opinion
[49] that we should, by the blessing of God upon our honest endeavours, in some measure promote these good ends, by taking care (as much as in us lieth) that no unworthy persons might hereafter be admitted into the sacred ministry of the church: nor any be allowed to serve as curates, but such as should appear to be duly qualified for such an employ; and that all who officiated in the room of any absent ministers, should reside upon the cures which they undertook to supply; and be ascertained of a suitable recompence for their labours.

In pursuance of those resolutions, to which we unanimously agreed, I do now very earnestly recommend to you;

(I.) *That you require of every person who desires to be admitted to holy orders, that he signify to you his name and place of abode, and transmit to you his testimonial, and a certificate of his age duly attested; with the title upon which he is to be ordained at least twenty days before the time of ordination; and that he appear on Wednesday, or at furthest on Thursday in ember week, in order to his examination.*

(II.) *That if you shall reject any person, who applies for holy orders upon the account of immorality proved against him, you signify the name of the person so rejected, with the reason of your rejecting him, to me, within one month; that so I may acquaint the rest of my suffragans with the case of such rejected person before the next ordination.*

(III.) *That you admit not any person to holy orders, who having resided any considerable time out of the university, does not send to you, with his testimonial, a certificate signed by the minister, and other credible inhabitants of the parish where he so resided, expressing that notice was given in the church, in time of divine service, on some Sunday, at least a month before the day of ordination, of his intention to offer himself to be ordained at such a time; to the end*

that any person who knows any impediment, or notable crime, for which he ought not to be ordained, may have opportunity to make his objections against him.

(IV.) *That you admit not letters testimonial, on any occasion whatsoever, unless it be therein expressed, for what particular end and design such letters are granted; nor unless it be declared by those who shall sign them, that they have personally known the life and behaviour of the person for the time by them certified; and do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted.*

(V.) *That in all testimonials sent from any college or hall, in either of the universities, you expect that they be signed, as well as sealed; and that among the persons signing, the governor of such college or hall, or in his absence, the next person under such governor, with the dean, or reader of divinity, and the tutor of the person to whom the testimonial is granted, (such tutor being in the college, and such person being under the degree of master of arts,) do subscribe their names.* [50]

(VI.) *That you admit not any person to holy orders upon letters dimissory, unless they are granted by the bishop himself, or guardian of the spiritualities* sede vacante; *nor unless it be expressed in such letters, that he who grants them, has fully satisfied himself of the title and conversation of the person to whom the letter is granted.*

(VII.) *That you make diligent inquiry concerning curates in your diocese, and proceed to ecclesiastical censures against those who shall presume to serve cures without being first duly licensed thereunto; as also against all such incumbents who shall receive and employ them, without first obtaining such licence.*

(VIII.) *That you do not by any means admit of any minister, who removes from any other diocese, to serve as a curate in yours, without testimony of the bishop of that diocese, or ordinary of the peculiar jurisdiction from whence he comes, in writing, of his honesty, ability, and conformity to the ecclesiastical laws of the church of England.*

(IX.) *That you do not allow any minister to serve more than one church or chapel in one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places, be not able in your judgment to maintain a curate.*

(X.) *That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church, and the particular direction of a late act of parliament for the better maintenance of curates.*

(XI.) *That in licences to be granted to persons to serve any cure, you cause to be inserted, after the mention of the particular cure provided for by such licences, a clause to this effect* [or in any other

parish within the diocese, to which such curate shall remove with the consent of the bishop.]

(XII.) *That you take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place, that they may conveniently perform all their duties both in the church and parish.*

[51] These, my lord, were the orders and resolutions, to which we all agreed; and which I do hereby transmit to you; desiring you to communicate them to the clergy of your diocese, with an assurance that you are resolved, by the grace of God, to direct your practice in these particulars agreeably thereunto. And so commending you to the blessing of God in these, and all your other pious endeavours, for the service of his church, I heartily remain,

My very good lord,

Your truly affectionate brother,

W. Cant.

(I.) *That you require of every person, &c.*] By this first article six things are required: viz.

(1.) *That he signify to you his name and place of abode*] It may be so ordered, that this shall be set forth in the testimonial, or title, or both; but it seemeth rather, that by this article a distinct instrument is required for the signification thereof.

(2.) *And transmit to you his testimonial*] According to the 34th canon, and the fourth and fifth articles of these directions.

(3.) *And a certificate of his age duly attested*] That is, from the register book, under the hands of the minister and churchwardens of the parish where he was baptized; or, where that cannot be had, by other sufficient testimony.

(4.) *With the title upon which he is to be ordained*] According to the tenor of the thirty-third canon before mentioned.

(5.) *At least twenty days before the time of ordination*] By the canons aforesaid, the title and testimonial are required to be exhibited *at* the time of ordination: but by these directions, they are to be transmitted for so long time before, as that there may be opportunity to make enquiry, if needful, into any of the particulars therein contained.

(6.) *And that he appear on Wednesday, or at farthest on Thursday in ember week*] This is agreeable to the canon law before mentioned out of Lindwood, that he shall appear on the fourth day before the ordination.

(II.) *That if you shall reject, &c.*] This second article, of signifying the names of persons rejected for immorality to the arch-

bishop, is a prudent caution; and was not provided for before by any law.

(III.) *That you admit not any person, &c.*] This article, concerning notice to be given in the church, is also a reasonable provision, and agreeable to foreign practice (as hath been observed) although not particularly injoined by any law in our church. [52]

In the present directions, as delivered by the archbishops of late years, there is an alteration in this article: Instead of the expression, that the minister and others shall certify "that notice "was given in the church of his intention to offer himself to be "ordained at such a time, *to the end that any person who knows* "*any impediment or notable crime, for the which he ought not to be* "*ordained, may have opportunity to make his objections against* "*him,*" (that is, to the bishop, as it seemeth)—it now runs, that they shall certify, "that such notice was given, *and that upon* "*such notice given no objections have come to their knowledge, for* "*the which he ought not to be ordained,*" (which implies the objections to be notified to the persons signing the certificate.)

(IV.) *That you admit not letters testimonial, &c.*] This and the next article concerning testimonials are supplementary to the thirty-fourth canon; and for their obligation do depend on these injunctions, and not on any fixed law; and therefore may be varied from time to time, as the archbishops and bishops shall see cause.

(V.) *That in all testimonials sent from any college, &c.*] By the canon, the common *seal* only of the college was required, which indeed of itself (as in all other bodies corporate) doth imply a consent of the major part of the society: This article doth further require a *quorum* (as it were); namely, that of the said major part, the head of the college, the dean, and the tutor, be three; and the same to appear by the subscription of their names. So that ordinarily it seemeth to be in the power of any one of those three, to prohibit any person of their college from being ordained; which thing perhaps may require some farther consideration. And it is much to the honour of the universities, that for so long time there have been no instances of the abuse of this power.

(VI.) *That you admit not any person into holy orders upon letters dimissory, &c.*] The article concerning letters dimissory, is only an admonition to put in due execution, what was the law of the church before.

(VII.) *That you make diligent inquiry concerning curates in your diocese who shall presume to serve cures without being first duly licensed*] The substance of this article, concerning the licensing of curates, was injoined before by several canons of the church.

(VIII.) *That you do not by any means admit of any minister, who removes from another diocese, to serve as a curate in yours,* [53]

without testimony of the bishop of that diocese, of his honesty, ability, &c.] This article concerning curates bringing testimonials from other dioceses, is nearly in the words of the forty-eighth canon.

In the present rules, instead of the word *honesty* (which is taken from the canon), are inserted the words *good life.*

(IX.) *That you do not allow any minister to serve more than one church or chapel in one day*] This article also is in the words of the forty-eighth canon.

(X.) *That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church*] There seemeth to be no particular law of the church, by which any certain sum is limited for the stipend of curates in general, but such as are obsolete and ineffectual by reason of the great alteration in the value of money. But the ordinary may refuse to license the curate, unless the incumbent shall in his nomination and appointment promise to pay unto the curate such a certain annual sum.

And the particular direction of a late act of Parliament] Which act is that of the 12 *An. st.* 2. *c.* 12. for the curates of non-residents only; by which the ordinary hath power, according to the value of the living and the difficulty of the cure, to appoint a salary not exceeding fifty pounds a-year, nor less than twenty.

(XI.) The clause to be inserted in the licence, that the same shall serve for *any other parish within the diocese,* is not injoined by any express law, but is very reasonable, being intended for the benefit of curates, that having been once examined and approved by the ordinary, they shall not need to be at the expence of a new licence for any other place unto which they shall remove within the diocese. — Which clause is omitted out of the present directions, supposing it perhaps to be unnecessary, in a matter the utility whereof is self-evident.

(XII.) This article concerning *the curate's residence within the parish,* is agreeable to the ancient laws of the church: and if the curate shall not comply with the ordinary's directions therein, the said ordinary may withdraw his licence.

To these directions, two others have been subjoined of late years:

One is, *That you be very cautious in accepting resignations; and endeavour, with the utmost care, by every legal method, to guard*
[54] *against corrupt and simoniacal presentations to benefices.* — This seemeth to be intended to counteract the purpose of bonds of resignation; for if the bishop will not accept, the resignation is ineffectual.

The Other is, *That your clergy be required to wear their proper habits, preserving always an evident and decent distinction from the laity in their apparel; and to shew, in their whole behaviour, that*

seriousness, gravity, and prudence, which becomes the function; abstaining from all unsuitable company and diversions. — The word *canonical*, with respect to the habit, seems here to have been purposely omitted; since no certain standard of dress can be conveniently limited by any canon or other law; and therefore general directions can only be applicable in such cases.

Upon the whole, with respect to the matter before us, whilst these directions continue to be the rule in practice, there are these five instruments to be transmitted to the bishop, at least twenty days before the time of ordination, by every person desiring to be ordained; viz.

First, a signification of his name and place of abode.

Secondly, a certificate of publication having been made in the church, of his design to enter into holy orders.

Thirdly, letters testimonial of his good life and behaviour.

Fourthly, certificate of his age.

Fifthly, the title upon which he is to be ordained.

And moreover, if he comes for priest's orders, he must exhibit to the bishop his letters of orders for *deacon*.

Form of a title for orders.

There is no particular form of a title prescribed by any canon, or other law: that which is most usual and approved seemeth to be as followeth:

To the right reverend father in God Richard lord bishop of London.

These are to certify your lordship, that I A. B. *rector* [or, *vicar*] *of* ——— *in the county of* ———, *and your lordship's diocese of London, do hereby nominate and appoint* C. D. *to perform the office of a curate in my church of* ——— *aforesaid, and do promise to allow him the yearly sum of* ——— *for his maintenance in the same, and to continue him to officiate in my said church until he shall be otherwise provided of some ecclesiastical preferment, unless by fault by him committed he shall be lawfully removed from the same. And I do solemnly declare, that I do not fraudulently give this certificate only to intitle the said* C. D. *to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed. Witness my hand this* ——— *day of* ——— *in the year of our Lord* ———. [55]

Form of a testimonial for orders.

The canon and the statute before mentioned, evidently make a distinction between the testimonial for deacon's, and the testimonial for priest's orders. In pursuance whereof, for *deacon's* orders, no more by the canon seemeth to be required than this:

If it is from a college;

We the master and fellows of ——— college in ——— do hereby testify, that A. B. *whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under the seal of our college, the ——— day of ——— in the year of our Lord ———.*

If it is not from a college:

We whose names and seals are hereunto set, do hereby testify, that A. B. *whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under our hands and seals the ——— day of ——— in the year of our Lord ———.*

But something more is required in the testimonial for *priest's* orders by the aforesaid statute of the 13 *El. c.* 12. As thus;

We ——— do hereby testify, that A. B. *whose life and behaviour we have known for the space of three years now last past, is a person of good and honest life and conversation, and professeth the doctrine expressed in the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London in the year of our Lord one thousand five hundred and sixty-two. Given under, &c.*

But by the aforesaid directions of archbishop *Wake*, somewhat further is required, in the testimonial both for deacon's and for priest's orders; namely, (1) that the same do express for what particular end and design it is granted; and (2) that the persons signing the same do declare therein, that they have personally known the life and behaviour of the person for the time by them certified; and (3) that they do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted; and (4) that if the testimonial is from a
[56] college, it be *signed* as well as sealed by the particular members of the college therein specified.

It doth not appear to have been clearly understood, what the intention was in directing that the testimonial should express *for what particular end and design it is granted:* the causes usually alleged are, that it is a man's duty to bear witness to the truth; that the party hath requested such testimonial; and that they are willing to comply with such request: But these (such as they are) are *general* reasons, and do not at all express the special end and design of granting such a particular testimonial. However, the usual form of a testimonial, according to Mr. *Ecton*, is to this effect:

To all Christian people to whom these presents shall come.

Whereas piety and humanity do oblige us to bear witness to the truth; and whereas A. B. *bachelor of arts, hath requested our letters testimonial of his laudable life and probity of manners to be granted to him: We, being willing to comply with his so just a request, do testify by these presents, that the aforesaid* A. B. *having been personally known to us for the space of three years last past, hath led his life piously, soberly, and honestly; hath diligently applied himself to his studies; and hath not (so far as we know) ever held, written, or taught any thing, but what the church of England approves of and maintains; and moreover we think him worthy (if it shall so seem good to those whom it may concern) to be promoted to the holy order of deacon* (or *priest*). *In witness whereof we have hereunto set our hands, the ——— day of ——— in the year of our Lord ———.*

Or thus (according to Dr. *Grey*):

To the right reverend father in God Richard lord bishop of Lincoln.

Whereas A. B. *of ——— college in ——— desiring to be admitted to the holy order of deacon* (or *priest*,) *hath requested our letters testimonial of his laudable life and integrity of manners to be granted to him: We, whose names are under written, do testify by these presents, that the aforesaid* A. B. *for three years last past, of our personal knowledge, hath led his life piously, soberly, and honestly; hath diligently applied himself to the study of good learning, and hath not (so far as we know) held or published any thing but what the church of England approves of and maintains; and moreover we think him worthy to be admitted to the holy order of deacon* (or *priest*). *In witness whereof we have hereunto subscribed our names,* [57]
the —— day of —— in the year of our Lord ——."

But in order to accommodate the same more strictly to the aforesaid canon, statute, and direction of archbishop *Wake*; perhaps the form might be more regularly thus:

To the right reverend father in God Charles lord bishop of Carlisle.

Whereas our beloved in Christ, A. B. *bachelor of arts, hath declared unto us his intention of offering himself a candidate for the holy order of deacon; and for that end hath requested our letters testimonial of his good and honest life and conversation and other due qualifications to be granted to him: We, whose names and seals are hereunto set, do testify by these presents, that we have personally known the life and behaviour of the aforesaid* A. B. *for the space of three years now last past; and that he hath, during the said time, been a person of good and honest life and conversation; and that*

he professeth the doctrine expressed in the articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, *in the year of our Lord one thousand five hundred and sixty-two: And we do believe in our consciences, that the said* A. B. *is qualified to be admitted (if it shall so please your lordship) to the holy order of deacon* (or *priest*). *Given under our hands and seals the* ——— *day of* ——— *in the year of our Lord* ———.

Hath declared unto us his intention of offering himself a candidate for the holy orders of deacon] This, according to the archbishop's directions, seemeth to express the particular end and design for which the testimonial is granted.

That we have personally known the life and behaviour, &c.] And not by way of recital, *whose life and behaviour we have known*, or *having been personally known unto us*, or the like; for the archbishop's directions in this case do require a positive declaration.

And that he hath during the said time been a person of good and honest life and conversation] This is required by the canon and the statute aforegoing: And herein the persons signing the testimonial do undertake for his *behaviour.*

And that he professeth the doctrine, &c.] Herein they undertake for his *orthodoxy:* and this by the statute aforesaid is required to be peremptory and express; and not, *so far as we know*, or the like: for it is possible they may not have used the proper means of information.

And we do believe in our consciences, &c.] In order to the forming of which belief, some sort of previous examination of the
[58] party, by the persons signing the testimonial, seemeth to be implied: And herein they undertake for his *learning.* Whereas, before, for *deacon*'s orders, they did only take upon them the knowledge of his *behaviour;* for *priest*'s orders, of his behaviour and *orthodoxy;* but now, for *both;* by these directions, they are to take upon them the knowledge of his *behaviour*, *orthodoxy*, and *learning:* Although this last is most properly the bishop's province; and not at all the less so, notwithstanding such testimonial.

Organ. See Church.
Ornaments of the church. See Church.

Osculatory.

THE *osculatory*, was a tablet or board, with the picture of Christ, or the blessed virgin, or some other of the saints, which, after the consecration of the elements in the eucharist,

the priest first kissed himself, and then delivered it to the people for the same purpose.

Ostiary.

OSTIARY, is one of the five inferior orders in the Roman church; whose office it is, to keep the doors of the church, and to toll the bell. *Gibs.* 99.

Overseers of a will. See Wills.
Oxford. See Colleges.

Pall.

THE *pall*, pallium episcopale, is a hood of white lamb's wool, to be worn as doctors' hoods upon the shoulders, with four crosses woven into it. And this pallium episcopale is the arms belonging to the see of Canterbury. *God.* 23. 1 *Warn.* 45.

Pannage. [59]

PANNAGE, *pasnage* (perhaps from *pasco*, to feed,) is the fruit of trees which the swine or other cattle feed upon in the woods; as acorns, crabs, mast of beech, chestnuts, and other nuts and fruits of trees in the woods; which is treated of under the title Tithes.

Sometimes also *pannage* is used to signify the money which is paid for the pannage itself.

Papist. See Popery.

Paraphernalia.

PARAPHERNALIA, from παρα *præter*, and φερνη *dos*, are the woman's apparel, jewels, and other things, which in the lifetime of her husband she wore as the ornaments of her person,

to be allowed at the discretion of the court, according to the quality of her and her husband. *Law of Test.* 383.

Which is treated of under the title **Wills**, *V.* 16. and **Marriage**, *II.* 4.

Pardon.

1. IT seemeth to have been always agreed, that the king's pardon will discharge any suit in the spiritual court *ex officio:* also it seems to be settled at this day, that it will likewise discharge any suit in such court *instantiam partis pro reformatione morum* or *salute animæ*, as for defamation, or laying violent hands on a clerk, or such like; for such suits are in truth the suits of the king, though prosecuted by the party. 2 *Haw.* 394.

2. Also it seems to be agreed, that if the time to which such pardon hath relation, be prior to the award of costs to the party, it shall discharge them: and it seems to be the general tenor of the books, that though it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them,
[60] because nothing appears in certain to be due for costs, before they are taxed. *Id.*

3. Also, if a person be imprisoned on a writ *de excommunicato capiendo*, for his contumacy in not paying costs, and afterwards the king pardons all contempts, it seems that he shall be discharged of such imprisonment, without any *scire facias* against the party; because it is grounded on the contempt, which is wholly pardoned: and the party must begin anew to compel a payment of the costs. *Id.*

4. But it seems agreed, that a pardon shall not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. Also it is agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum* or *salute animæ*, as for defamation, or the like, they shall not be discharged by a subsequent pardon. *Id.*

5. A person admitted to the benefit of clergy, is not to be deprived in the spiritual court, for the crime for which he hath had his clergy. For a pardon frees the party from all subsequent punishment, and consequently from deprivation. 2 *Haw.* 364.

6. By the statute of the 20 *G.* 2. *c.* 52. (which is the last act of general pardon) all contempts in the ecclesiastical court in matters of correction are pardoned; but not in causes which have been commenced for matters of right.

Parish.

1. (A.) AT first there were no parochial divisions of cures here in England, as there are now. For the bishops and their clergy lived in common; and before that the number of christians was much increased, the bishops sent out their clergy to preach to the people, as they saw occasion. But after the inhabitants had generally embraced christianity, this itinerant and occasional going from place to place, was found very inconvenient, because of the constant offices that were to be administered, and the people not knowing to whom they should resort for spiritual offices and directions. Hereupon the bounds of parochial cures were found necessary to be settled here, by those bishops who were the great instruments of converting the nation from the Saxon idolatry. At first they made use of any old British churches that were left standing; and afterwards from time to time in successive ages, churches were built and endowed by lords of manors and others, for the use of the inhabitants of their several manors or districts, and consequently parochial bounds affixed thereunto. 1 *Still.* 88, 89.

First institution of parishes.

[61]

And it was this which gave a primary title to the patronage of laymen; and which also oftentimes made the bounds of a parish commensurate to the extent of a manor. *Ken. Impropr.* 5, 6, 7. (1)

Many of our writers have ascribed the first institution of parishes in England to Archbishop *Honorius*, about the year 636; wherein they built all on the authority of Archbishop *Parker*. But Mr. *Selden* seems rightly to understand the expression *provinciam suam in parochias divisit*, of dividing his province into new *dioceses;* and this sense is justified by the author of the defence of pluralities. The like distinction of parishes which now obtains, could never be the model of Honorius, nor the work of any one age. Some rural churches there were, and some limits prescribed for the rights and profits of them. But the reduction of the whole country into the same formal limitations was gradually advanced, being the work of many generations. However at the first foundation of parochial churches (owing sometimes to the sole piety of the bishop, but generally to the lord of the manor) they were but few, and consequently at a great distance; so as the number of parishes depending on that of churches, the parochial bounds were at first much larger, and by degrees contracted. For as the country grew more populous, and persons more devout, several other churches were founded within the extent of the former, and then a new parochial circuit was allotted in proportion to the new church, and the manor or estate of the

(1) And see 1 *Bla. Comm.* 112—114. 2 *Id.* 21.

founder of it. Thus certainly began the increase of parishes, when one too large and diffuse for the resort of all inhabitants to the one church, was by the addition of some one or more new churches cantoned into more limited divisions. (2) This was such an abatement to the revenue of the old churches, that complaint was made of it in the time of Edward the confessor: "Now (say "they) there be three or four churches, where in former times "there was but one; and so the tithes and profits of the priest "are much diminished." *Ken. Par. Ant.* 586, 587.

[52]

Bounds of parishes.

And now, the settling the bounds of parishes depends upon ancient and immemorial custom. For they have not been limited by any act of parliament, nor set forth by special commissioners; but have been established, as the circumstances of times and places and persons did happen to make them greater or lesser. 1 *Still.* 243.

In some places, parishes seem to interfere, when some place in the middle of another parish belongs to one that is distant; but that hath generally happened by an unity of possession, when the lord of a manor was at the charge to erect a new church, and make a distinct parish of his own demesnes, some of which lay in the compass of another parish. 1 *Still.* 244.

But now care is taken (or ought to be) by annual perambulations to preserve those bounds of parishes, which have been long settled by custom. 1 *Still.* 244.

Parish bound to support its poor, and repair its roads.

[1. (B.) *Primâ facie* the whole parish is bound to support its poor jointly; but a ville or township may have separate overseers of its own, under the 13 & 14. *C.* 2. *c.* 12.; and the court of K. B. will assist such a subdivision of a parish on the ground of conveniency. *Rex* v. *Inhabitants of Leigh*, 3 *Term Rep.* 746. The parish at large is also bound to repair all high roads lying within it, unless that burden be thrown on others by prescription or tenure; and therefore, if a parish be partly situate in one county, and partly in another, and a highway in one part be out of repair, the indictment must be against the whole parish, and not against the inhabitants of that part only in which the road lies. *Rex* v. *The Inhabitants of Clifton*, 5 *Term Rep.* 498. *contra Rex* v. *Weston*, 4 *Bur.* 2507. If the inhabitants of a township, bound by prescription to repair the roads within the township, be exempted by the provisions of an act of parliament, from repairing any new

(2) Some lands, either because they were in the hands of irreligious careless owners, or were situate in forests and deserts, or for other unsearchable reasons, were never united to *any* parish, and therefore continue to this day extra-parochial: and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the good of the church. 1 *Bla. Comm.* 113. 283. see 17 *G.* 2. *c.* 37. *infra.*

roads which may be made within it, the charge will fall on the rest of the parish. *Rex* v. *The Inhabitants of Sheffield*, 2 *Term Rep*. 106. Where one side of a common highway is situated in one parish, and the other side in another, two justices may determine what parts shall be repaired by each. 34 G. 3. c. 64.

2. By a constitution of Archbishop *Winchelsey*; the parishioners shall find at their own charge *banners for the rogations*. Lind. 252.

Perambulation of the boundaries of parishes.

[63]

And upon the account of perambulations being performed in rogation week, the rogation days were anciently called *gangedays*; from the Saxon *gan* or *gangen*, to go.

M. 37 & 38 *El*. *Godday* and *Michel*. Trespass for breaking his close, and for breaking down two gates, and three perches of hedge. The defendant justifies; for that the said close was in the parish of Rudham, and that all the parishioners there for time immemorial had used to go over the said close upon their perambulation in rogation week; and because the plaintiff stopped the two gates and obstructed three perches of hedge in the said way, the defendant being one of the parishioners broke them down. And by the court; It is not to be doubted but that parishioners may well justify the going over any man's land in the perambulation, according to their usage, and abate all nuisances in their way. *Cro*. *Eliz*. 441.

In the perambulation of a parish, no refreshment can be claimed by the parishioners, as due of right from any house or lands in virtue of custom. The making good such a right on that foot, hath been twice attempted in the spiritual courts; but in both cases, prohibitions were granted, and the custom declared to be against law and reason. *Gibs*. 213. 2 *Roll's Rep*. 259. 2 *Lev*. 163. 3 *Keb*. 609. (3)

These perambulations (though of great use in order to preserve the bounds of parishes) were in the times of popery accompanied with great abuses; viz. with feastings and with superstition; being performed in the nature of processions, with banners, hand bells, lights, staying at crosses, and the like. And therefore when *processions* were forbidden, the useful and innocent part of *perambulations* was retained, in the injunctions of Queen Elizabeth; wherein it was required, that for the retaining of the perambulation of the circuits of parishes, the people should once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church make their common prayers. And the curate, in their said common perambulations, was at certain convenient places to admonish the people, to give thanks to God (in the beholding of his benefits), and for the in-

(3) *Welby* v. *Herbert*.

crease and abundance of his fruits upon the face of the earth; with the saying of the 103d psalm. At which time also the said minister was required to inculcate these or such like sentences,
[64] *Cursed be he which translateth the bounds and dolles of his neighbour;* or such other order of prayers, as should be lawfully appointed. *Gibs.* 213.

But the superstitions here laboured against, were not so easily suppressed; as may be gathered from the endeavours used to suppress them so late as the time of archbishop Grindal: and now, since that hath been long effected, it were to be wished, that perambulations were held more regularly and frequently than they now are; to the end the limits of parishes may be the better kept up and ascertained. *Gibs.* 213.

Bounds of parishes, where to be tried. (4)

3. The bounds of parishes, though coming in question in a spiritual matter, shall be tried in the temporal court. This is a maxim, in which all the books of common law are unanimous;

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(4) The bounds of a parish may be tried in an action at law; but a bill will not lie for an issue or *commission to ascertain boundaries* between two *parishes:* except perhaps the parishioners have a common right, as where all the tenants of a manor claim a right of common by custom, in which case the right of all is tried by trying the right of one; or where all parties concerned, or who have a probable interest, are before the court. *St. Luke's* v. *St. Leonard's*, 1 *Bro. C. C.* 40. 2 *Anstr.* 386—395. *Atkyns* v. *Hatton*, 2 *Anstr.* 386. S.P. In this last case a commission was prayed in exchequer to ascertain the bounds of a parish, upon a presumption that all the lands within it would be titheable to the parson, but denied; and it was said, that *St. Luke's* v. *St. Leonard's* was, upon a bill brought by the former parish to avoid confusion in making the rates, a number of houses having been built on waste land, and it being doubtful to which parish the different parts of the waste belonged. On bill to establish a modus, and that a neighbouring rector may interplead as to the tithes to be covered thereby, and that a commission may issue to ascertain the boundaries of each rectory, the court refused the commission; for the rectors have different claims, one claims in kind and the other a *modus*. *Woolaston* v. *Wright*, 3 *Anstr.* 801. See *Johnson* v. *Atkinson*, *id.* 798. A commission was granted to ascertain and distinguish or to set out boundaries on a bill by a prebendary against the lessees of the prebendal lands, and also against the owners of other lands in the parish with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. *Willis* v. *Parkinson*, 2 *Meriv.* 507.; and the plaintiff is entitled to name as many commissioners as his lessees. S.C. 1 *Swanst. Rep.* 9. This jurisdiction is deduced from the writs *de rationabilibus divisis* and *de preambulatione faciendâ*. *Speer* v. *Crawter*, 2 *Meriv. Rep.* 416. The granting the commission is not of course as respects the boundaries of *legal* estates: there must be some *equitable* circumstances in the case. *Wake* v. *Conyers*, 1 *Edin. Rep.* 331. 2 *Cox*, 360. S.C. In every bill praying a commission it must be clearly shewn

although our provincial constitutions do mention the bounds of parishes, amongst the matters which merely belong to the ecclesiastical court, and cannot belong to any other. *Gibs.* 212.

And in the 14 *C.* when a prohibition was prayed to the spiritual court, for proceeding to determine a case of tithes, the right to which depended on the lands lying in this or that *vill*; it was denied by the whole court of king's bench, who declared, that the bounds of vills are triable in the ecclesiastical court. *Gibs.* 213.—But this was between two spiritual persons, the rector and vicar. 2 *Roll's Abr.* 312.

And in the case of *Ives* and *Wright*, *H.* 15 *Car.* If the bounds of a village in a parish come in question in the ecclesiastical court, in a suit between the parson impropriate and the vicar of the same parish, as if the vicar claim all the tithes within the village of D. within the parish, and the parson all the tithes in the residue of the parish, and the question between them is, whether certain lands, whereof the vicar claims the tithe, be within the village of D. or not; yet inasmuch as it is between spiritual persons, viz. between the parson and vicar, although the parson be a layman, and the parsonage appropriate a lay-fee, yet it shall be tried in the ecclesiastical court. And in this case the prohibition was denied. 2 *Roll's Abr.* 312. [65]

And by the 17 *G.* 2. *c.* 37. it is enacted, that where there shall be any dispute, in what parish or place, improved wastes and drained and improved marsh lands lie, and ought to be rated; the occupiers of such lands, or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to the relief of the poor and to all other parish rates within such parish and place which lies nearest to such lands; and if on

that without the assistance of the court the boundaries cannot be found; and a foundation must be laid for this species of relief by shewing not merely that they are confused, but that the confusion has arisen from some misconduct of the defendant, or of those under whom he claims, of which the party has a right to complain, and which renders it incumbent on the defendant to co-operate with him in re-establishing them. Where it arose out of the unity of possession by plaintiff's own tenants, and before the land came into defendant's possession, and nothing was stated in the bill but the mere fact of confusion, the court refused to interfere, *Miller* v. *Warmington*, 1 *Jac. & Walk. Rep.* 484. Commissioners of perambulation must make a return, and if they cannot agree in making it, must report specially. But before such return or report is made, the court will not grant a new commission on allegation of their disagreement. *Carbery* v. *Mansell*, *Vern. & Scriv. Rep.* 112. A.D. 1787.

The parson cannot give evidence on a question relating to the bounds of his parish, for he is interested to enlarge them, and consequently his tithes. *Wharton* v. *Robinson*, 7 *Mod.* or *Farresl. Rep.* 63. See 2 *Ves.* 425. *Dougl.* 142. *Cowp.* 437.

application to the officers of such parish or place to have the same assessed, any dispute shall arise; the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed; whose determination therein shall be final. But this shall not determine the boundaries of any parish or place, other than for the purpose of rating such lands to the relief of the poor, and other parochial rates. § 1, 2.

And by the 2 & 3 *Ed.*6. *c.*13. Every person who shall have any beasts or other cattle titheable, depasturing in any waste or common, whereof the parish is not certainly known, shall pay the tithes thereof where the owner of the cattle dwells. § 3.

[Commissioners of inclosure of commons, &c. are to examine witnesses on oath as to the boundaries of *parishes*, &c. and if they do not appear to them to be sufficiently ascertained, shall ascertain the same to remain the boundaries thereof. Persons dissatisfied with their decision may appeal to the sessions. 41 *G.*3. (*U.K.*) *c.*109. § 3.]

[66]

Parish clerk.

Parish clerk.

1. BONIFACE. *We do decree that the offices for holy water be conferred upon poor clerks.* Lind. 142.

For the understanding of which constitution, it is to be observed, that parish clerks were heretofore real clerks; of whom every minister had at least one, to assist under him, in the celebration of divine offices; and for his better maintenance, the profits of the office of *aquæbajalus* (who was an assistant to the minister in carrying the holy water) were annexed unto the office of the parish clerk by this constitution: so as, in after times, *aquæbajalus* was only another name for the clerk officiating under the chief minister.

His qualification.

2. *Can.* 91. And the said clerk shall be twenty years of age at the least; known to the parson, vicar, or minister, to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing (if it may be).

How to be appointed.

3. All incumbents once had the right of nomination of the parish clerks by the common law and custom of the realm. *Gibs.* 214.

And by the aforesaid constitution of archbishop *Boniface*; — Because differences do sometimes arise between rectors and vicars

and their parishioners, about the conferring of such offices, we do decree, that the same rectors and vicars, whom it more particularly concerneth to know who are fit for such offices, shall endeavour to place such clerks in the aforesaid offices, who, according to their judgment, are skilled and able to serve them agreeably in the divine administration, and who will be obedient to their commands.

And by Can. 91. *No parish clerk upon any vacation shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being: which choice shall be signified by the said minister, vicar, or parson, to the parishioners the next Sunday following in the time of divine service.*

Since the making of which canon, the right of putting in the parish clerk hath often been contested between incumbents and parishioners, and prohibitions prayed, and always obtained, to the spiritual court for maintaining the authority of the canon in favour of the incumbent, against the plea of custom in behalf of the parishioners. *Gibs.* 214.

Thus, *E.* 8 *Ja. Cundict* and *Plomer*. The parishioners of the [67] parish of St. Alphage in Canterbury, did prescribe to have the election of their parish clerk, and by the canon, the election of the clerk is given to the vicar: It was adjudged in this case, that the prescription should be preferred before the canon: and a prohibition was awarded accordingly. *Hughes*, 275. (5)

T. 21 *Ja. Jermyn's* case. Jermyn rector of the parish of St. Katherine's in Coleman street, and Hammond as clerk there, sued in the spiritual court to have the said clerk established there, being placed there by the parson according to the late canon; where the parishioners disturbed him upon a pretence of a custom to place the clerk there by the election of their vestry. And upon this surmise of a custom, the churchwardens and parishioners prayed a prohibition; and after divers motions, a prohibition was granted: for they held that it was a good custom, and that the canon cannot take it away. *Cro. Ja.* 670.

[By 59 *G.* 3. *c.* 134. § 29. The clerk in every [new] church and chapel built under 58 *G.* 3. *c.* 45., 59 *G.* 3. *c.* 134. &c., shall be annually appointed by the minister. The office is for life, though the term for which he shall have it is not mentioned on his nomination. *Townsend* v. *Thorp*, 2 *Raym.* 1507. So though he is in without deed. 2 *Salk.* 536.]

4. Parish clerks, after having been duly chosen and appointed, are usually licensed by the ordinary. *Johns.* 204. **How to be admitted.**

(5) 13 *Rep.* 70. S. C. for the custom of election is a thing merely temporal, and the party chosen is a mere temporal man, and see *The King* v. *Warren*, *Cowp.* 270. *infra.*

And when they are licensed, they are sworn to obey the minister. *Johns.* 205.

And if a parish clerk hath been used time out of mind to be chosen by the vestry, and after admitted and sworn before the archdeacon, and he refuse to swear such parish clerk so elected, but admitteth another chosen by the parson; a writ may be awarded to him commanding him to swear him. 2 *Rol. Abr.* 234. *Viner*, Mandamus, H. 3. 8 *Bac. Abr.* 531.

And in the case of *K.* and *Henchman*, official of the consistory court of the bishop of *London*, a mandamus was granted, to admit one Robert Trott to the office of parish clerk of Clerkenwell, being elected by the parish: it being shewn that the official had usually admitted to that office. 3 *Bac. Abr.* 531.

His salary. 5. By the aforesaid constitution of archbishop *Boniface*; If the parishioners shall maliciously withhold the *accustomed alms* from the *aquæbajalus*, they shall be earnestly *admonished* to render the same; and if need be, shall be compelled *by ecclesiastical censure*.

Alms] By which word we may understand that such clerks cannot claim any thing by way of a certain allowance or endowment by reason of their office of *aquæbajalus*: But their sustentation ought to be collected and levied according to the manner and custom of the country. *Lindw.* 143. [68]

Accustomed alms] For this custom ought to be considered according to the manner anciently observed; which also, inasmuch as it concerneth the increase of divine worship, ought not to be changed at pleasure: but hereunto the parishioners may be compelled by the bishop. *Lindw.* 143.

And custom of this kind is good and laudable, that every master of a family (for instance) on every Lord's day give to the clerk bearing the holy water somewhat according to the exigency of his condition; and that on Christmas day he have of every house one loaf of bread, and a certain number of eggs at Easter, and in the autumn certain sheaves. Also that may be called a laudable custom, where such clerk every quarter of the year receiveth something in certain in money for his sustenance, which ought to be collected and levied in the whole parish. For such laudable custom is to be observed; and to this the parishioners ought to be compelled; for having paid the same for so long a time, it shall be presumed that at first they voluntarily bound themselves thereunto. *Lindw.* 143.

Admonished] Not only by the ministers, but also and more especially by the ordinary of the place. *Lindw.* 143.

By ecclesiastical censure] Of which there are three kinds: suspension, excommunication, and interdict. *Lindw.* 143.

And by Can. 91. The said clerks shall have and receive their *ancient wages*, without fraud or diminution, either at the hands

of the churchwardens, at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish.

Ancient wages] In case such customary allowance is denied, the foregoing constitution, and the practice thereupon, direct where it is to be sued for, viz. before the ordinary in his ecclesiastical court. That constitution (as we see) calls those wages *accustomed alms*; and in the register there is a consultation provided in a case of the same nature, for what the writ calls *largitio charitativa* (as being originally a free gift), which by parity of reason may be fairly extended to the present case. *Gibs.* 214.

But by the common law; If a parish clerk claim by custom to have a certain quantity of bread at Christmas, of every inhabitant of the parish, or the like, and sue for this in a spiritual court; a prohibition lieth. 2 *Rol. Abr.* 286. [69]

M. 3 *An. Parker* v. *Clarke*. The clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then, and not before, it had been proper to move for a prohibition. But by *Holt* chief justice; it is never too late to move the king's bench for a prohibition, where the spiritual court had no original jurisdiction, as they had not in this case, because a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied and not paid by them to the plaintiff. 6 *Mod.* 252. 3 *Salk.* 87.

H. 12 *G.* 2. *Pitts* v. *Evans*. A prohibition was granted to a suit in the spiritual court by the clerk of St. Magnus for 1s. 4d. assessed on the defendant's house at a vestry in 1672, to be paid to the parish clerk. For, by the court, he is a temporal officer; or if not, yet he could not sue there for such a rate: for if it is due by custom, he may maintain an *assumpsit*; if not, a *quantum meruit*, or a bill in equity. *Strange*, 1108. (*l*) *

(*l*) S. C. 13 *Vin. Ab.* 155.

* But to sue for so small a matter, either at law or in equity, seems by no means eligible; as the remedy must needs be abundantly worse than the disease. Why it might not be made recoverable before justices of the peace, in like manner as small tithes, or in some

How to be removed from his office.

6. The parish clerk ought to be deprived by him that placed him in his office; and if he is unjustly deprived, a mandamus will lie to the churchwardens to restore him (6): for the law looks upon him as an officer for life, and one that hath a freehold in his place, and not as a servant; and therefore will not suffer the ecclesiastical court to deprive him, but only to correct him for any misdemeanour by ecclesiastical censure. 3 *Rol. Abr.* 234. *Gibs.* 214. *God.* 192.

T. 13 *G. Townshend* and *Thorpe.* The plaintiff declared in prohibition; that he was indicted for an assault with intent to commit sodomy, notwithstanding which he was proceeded against in the spiritual court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. Demurrer thereupon. And as it was going to be argued, the court proposed to stay till the indictment was tried; and it having been tried, and the defendant convicted and pilloried, the court, without ordering the declaration to be amended, granted a consultation as to the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said, he was an ecclesiastical officer as to every thing but his election. *Str.* 776. [but see next case.]

M. 6 *G.* 2. *Peak* and *Bourne.* The plaintiff declared in prohibition, that he was sued in the spiritual court for executing the office of deputy parish clerk, without the license of the ordinary. On demurrer, three points were made: 1. Whether a parish clerk be a temporal or a spiritual office. 2. Whether he can make a deputy. 3. Whether the license of the ordinary is requisite. It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last; as to which they held, that a license was not necessary, and therefore gave judgment for the plaintiff in prohibition.
[71] They said the canon did not require it, and indeed it would be a transferring the right of appointment to all intents and purposes

other easy and expeditious method, no sufficient reason seems to have been assigned. Indeed, after all, the manner of recovering this salary, difficult as it may be, is not the greatest difficulty; for by the continual decrease in the value of money, almost nothing remains to be contended for. Two-pence or three-pence, or a like diminutive sum, for each house, when these salaries first became established, and for a long time after, were of more real intrinsic worth, than ten times the same nominal sums at present, and are decreasing in value every day. Insomuch that unless some other course shall be taken to bring this matter back nearer to the original standard, very few persons will be found who will accept the office, and many parishes already are become entirely destitute.

(6) *Ile's* case, 1 *Vent.* 148. *The King* v. *Warren*, *infra.*

to the ordinary. As to the two other points, the court strongly inclined that he was a temporal officer as to the right of his office; and that he might make a deputy. And as to the first, when the court were pressed with their own authority in *Townshend* and *Thorpe*, they said it was a hasty opinion into which they were transported by the enormity of the case. *Str.* 942.

T. 30 *&* 31 G.2. *Tarrant* and *Haxby*. A motion was made for a prohibition to the consistory court of York, to stay their proceedings against Tarrant the present parish clerk of St. Osith in York; which proceedings were there instituted at the instance of Haxby the deprived parish clerk, for the restoration of the said Haxby. It was urged that the office is temporal; and therefore that the spiritual court hath no jurisdiction concerning his deprivation. This Haxby, they said, was deprived by the parson and the whole parish, for drunkenness during divine service, and other misdemeanours: Whereupon the parson appointed Tarrant in his room. Against whom, Haxby libelled in the consistory court; where there was a monition, and they were proceeding to restore Haxby. And all this was suggested. Upon which, a rule was granted to shew cause. And now cause was to have been shewn. But the counsel, being satisfied that it was too strong against them, gave it up. And the rule for the prohibition was made absolute. 1 *Burr.* 367.

H 16 *G.*3. *K.* and *Erasmus Warren*, clerk. In the last term cause was shewed against a mandamus to restore William Readshaw to the office of parish clerk of Hampstead. It was stated, that the clerk was appointed by the minister: that he had since become bankrupt, and had not obtained his certificate. That he had been guilty of many omissions in his office; was actually in prison at the time of his amoval; and had appointed a deputy who was totally unfit for the office. Against which, it was insisted, that the office of parish clerk is a temporal office during life: that the parson cannot remove him: and that he has a right to appoint a deputy. Lord *Mansfield* then said, there was an application of this sort in a cause of *K.* and *Proctor*, *M.* 15 G.3. where the parson removed a parish clerk appointed by the former incumbent. There the right of amotion was in question, and all agreed it must be somewhere, but that case was not decided. (7) Lord *Mansfield* asked, what remedy is there in Westminster-hall

(7) Parish clerks are regarded by the common law as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived by ecclesiastical censure, 2 *Rol. Abr.* 234. Parish clerks in the new churches or ecclesiastical districts or parishes, &c. built and erected under 58 *G.* 3. *c.* 45., 59 *G.* 3. *c.* 134. and 3 *G.* 4. *c.* 72., are to be annually appointed by the minister thereof, 59 *G.* 3. *c.* 134. *s.* 29. See Churches.

to remove him? He certainly hath his office only during his good behaviour. But though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him at pleasure, without being subject to the control of this court. By Mr. Justice *Aston:* as long as the clerk behaves himself well, he has a good right and title to continue in his office. Therefore if the clergyman has any just cause for removing him, he should state it to the court.— Accordingly, the court enlarged the rule to this term, that affidavits might be made on both sides, of the cause and manner of amotion. And now on this day, upon reading the affidavits, Lord *Mansfield* said, it was settled in the case of *K.* and Dr. *Ashton*, 28 G. 2. That a parish clerk is a temporal officer, and that the minister must shew ground for turning him out. Now in this case, there is no sufficient reason assigned in the affidavits that have been read, upon which the court can exercise their judgment; nor is there any instance produced of any misbehaviour of consequence: therefore the rule for a mandamus to restore him must be made absolute. *Cowper*, 370.

[Serving the office of parish clerk for a year gains a settlement, although he be chosen by the parson, and not the parishioners, and have no license from the ordinary, and although he be a certificate man. 1 *Salk.* 536. 2 *Str.* 942. 2 *Sess. Cas.* 182.]

Parochial Library. See Library.

Parson.

PARSON, *persona*, properly signifies the rector of a parish church; because during the time of his incumbency, he represents the church, and in the eye of the law sustains the *person* thereof, as well in suing as being sued, in any action touching the same. *God.* 185. (8)

Parson *imparsonee* (*persona impersonata*) is he that as lawful incumbent is in actual possession of a parish church, and with

(8) See *Co. Litt.* 300. *Com. Dig.* tit. *Parson* and *Ecclesiastical Persons.* (*C.* 6, 7, 8.)

A rectory or parsonage consists of glebe tithes and oblations established for maintenance of a parson, or a rector to have cure of souls in the same parish: there need be no more glebe than the soil of the church or church-yard, but there ought to be some land, for if tithes only are proved, it is not a rectory. 3 *Salk.* 377. 1 *Sid.* 91. See 1 *Mod.* 12.

whom the church is full, whether it be presentative or impropriate. 1 *Inst.* 300.

The law concerning parsons, as distinct from vicars, is treated of under the title **Appropriation.**

Patriarch.

[73]

A *PATRIARCH* is the chief bishop over several *countries* or provinces, as an archbishop is of several dioceses; and hath several archbishops under him. *God.* 20.

Patron, Patronage. See **Advowson.**

Peculiar.

1. EXEMPT jurisdictions are so called, not because they are under no ordinary; but because they are not under the ordinary of the diocese, but have one of their own. These are therefore called peculiars, and are of several sorts. 1 *Still.* 336. **Exempt jurisdictions in general.**

2. As, first, Royal peculiars: which are the king's free chapels, and are exempt from any jurisdiction but the king's, and therefore such may be resigned into the king's hands as their proper ordinary; either by ancient privilege, or inherent right, 1 *Still.* 337. *Lindw.* 125. **Royal peculiars.**

3. Peculiars of the archbishops, exclusive of the bishops and archdeacons; which sprung from a privilege they had to enjoy jurisdiction in such places where their seats and possessions were: and this was a privilege no way unfit or unreasonable, where their palaces were, and they oftentimes repaired to them in person; as anciently the archbishops appear to have done, by the multitude of letters dated from their several seats. *Gibs.* 978. (*m*) **Archbishops' peculiars.**

In these peculiars (which, within the province of Canterbury, amount to more than a hundred, in the several dioceses of London, Winchester, Rochester, Lincoln, Norwich, Oxford, and Chichester) jurisdiction is administered by several commissaries; the chief of whom is the dean of the arches, for the thirteen peculiars within the city of London. (9) And of these Lind-

(*m*) Vide *Godolph. Repert. Canon.* 13, 14.

(9) The "Peculiars of Canterbury," Κατ' ἐξοχην embrace 13 parishes within the city of London, composing the deanery of the arches, and the several parishes composing the deaneries of Croydon in Surrey, and Shoreham in Kent; of these the dean of the arches is judge: in

wood (p. 79.) observes that their jurisdiction is archidiaconal. *Gibs.* 978.

Peculiars of bishops in another diocese.

4. Peculiars of bishops, exclusive of the jurisdiction of the bishop of the diocese in which they are situated. Of which sort, the bishop of London hath four parishes within the diocese of Lincoln; and every bishop who hath a house in the diocese of another bishop, may therein exercise episcopal jurisdiction. [See Bishop.] And therefore Lindwood (p. 318.) says, the significa-[74]tion of *bishoprick* is larger than that of *diocese*, because a bishoprick may extend into the diocese of another bishop, by reason of a peculiar jurisdiction which the bishop of another diocese may have therein. *Gibs.* 978.

Peculiars of bishops in their own diocese exclusive of archidiaconal jurisdiction.

5. Peculiars of bishops in their own diocese, exclusive of archidiaconal jurisdiction. Of which, Lindwood (p. 220.) writes thus: There are some churches, which although they be situate within the precincts of an archdeaconry, yet are not subject to the archdeacon; such as churches regular of monks, canons, and other religious; so also if the archbishop hath reserved specially any churches to his own jurisdiction, so as that within the same the archdeacon shall exercise no jurisdiction; as it is in many places, where the archbishops and bishops do exercise an immediate and peculiar jurisdiction. *Gibs.* 978.

As to the former of these, the jurisdiction over religious houses, the archdeacons were excluded from that by the ancient canon law, which determines, that archdeacons shall have no jurisdiction in monasteries, but only by general or special custom; and if the archdeacon could not make out such custom, he was to be excluded from jurisdiction, because he could not claim any authority of common right. As to the other, namely, the exempting of particular parishes from archidiaconal jurisdiction; there are not only many instances of such exemptions in the ecclesiastical records, but the parishes themselves continue so exempt, and remain under the immediate jurisdiction of the archbishop, as in other places of the bishop. *Gibs.* 978.

Of deans, prebendaries, and others.

6. Peculiars of deans, deans and chapters, prebendaries, and the like; which are places wherein by ancient compositions the bishops have parted with their jurisdiction as ordinaries, to those societies; probably because the possessions of the respective corporations, whether sole or aggregate, lay chiefly in those places: the right of which societies was not original, but derived from the bishop, and where the compositions are lost, it depends upon prescription. *Gibs.* 978. 1 *Still.* 337.

M. 8 *W. Robinson* and *Godsalve.* Upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that

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the other peculiars, commissaries exercise the jurisdiction, and appeal lies to the arches from their sentences. 1 *Phill. Rep.* 201.

the party lived within a peculiar archdeaconry; it was resolved by the court, that where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted: but if the archdeacon hath not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he hath election to chuse which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123. [75]

It seems to be true doctrine, that no exemption granted to persons or bodies under the degree of bishops, extend to a power of employing any bishop they can procure, to perform for them such acts as are merely episcopal, unless special words be found in their grants of exemption, impowering and warranting them so to do; but that all such acts are to be performed by the bishop of the diocese within which they are situated, after the exemption as much as before: Or, in other words, that the exemptions in which no such clause is found, are only exemptions from the exercise of such powers, as the persons or bodies are *capable* of exercising. Thus it is in granting letters dimissory (as hath been shewed before, in the title, **Ordination.**) And thus it seems to have been understood in the act of consecrating churches and churchyards, and reconciling them when polluted; by a license which we find the dean of Windsor had from the guardian of the spiritualities of Salisbury, to employ any catholick bishop to reconcile the cloyster and yard of the said free chapel, when they had been polluted by the shedding of blood. *Gibs.* 978.

In the time of archbishop Winchelsey, upon an appeal to Rome, in a controversy concerning Pagham, a peculiar of the archbishop of Canterbury; it was said, in the representation to the pope, to be of Canterbury *diocese;* which was objected against in the exceptions on the other side, because in truth and notoriety it is in the diocese of Chichester. Which was a just exception in point of form; because the proper style of those peculiars, as often as they are mentioned in any instruments, is, *of* or *in such a diocese* (namely, the diocese in which they are situated), *and of the peculiar and immediate jurisdiction of the archbishop.* Gibs. 979.

Of monasteries.

7. Peculiars belonging to monasteries; concerning which it is enacted by the 31 *H.* 8. *c.* 13. that such of the late monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, and all [76]

churches and chapels to them belonging, which before the dissolution were exempted from the visitation and other jurisdiction of the ordinary, shall from henceforth be within the jurisdiction and visitation of the ordinary, within whose diocese they are situate, or within the jurisdiction and visitation of such persons as by the king shall be limited and appointed. § 23.

Such exemptions were commonly granted at Rome, to those who solicited for them; especially to the larger monasteries, and such who had wealth enough to solicit powerfully: but the right of visitation being of common right in the bishop, the religious who had obtained such exemptions, were liable to be cited, and were bound upon pain of contumacy, either to submit to his visitation, or to exhibit their bulls of exemption, to the end they might be viewed and examined, and the bishop might see of what authority and extent they were. And whereas this statute vests a power in the king, to subject any of those religious houses which were heretofore made exempt, to such jurisdiction as he should appoint, exclusive of the ordinary; there can be no doubt, but that the persons who claim exemption from the visitation of the ordinary in virtue of such appointment, are obliged upon pain of ecclesiastical censures (in like manner as the religious were) to submit the evidences of their exemption to the examination of the ordinary; without which, it is impossible for him to know how far his authority extends. *Gibs.* 977.

Appeal from places exempt.

8. By the 25 *H.* 8. *c.* 19. All appeals to be had from places exempt, which heretofore, by reason of grants or liberties of such places exempt, were to the bishop or see of Rome, shall be to the king in chancery; which shall be definitely determined by authority of the king's commission: so that no archbishop or bishop shall intermit or meddle with any such appeals, otherwise than they might have done before the making of this act. § 6.

Visitation of places exempt.

9. By the 25 *H.* 8. *c.* 21. § 21. Visitations of places exempt, which heretofore were visited by the pope, shall not be by the archbishop of Canterbury; but in such cases, redress visitation and confirmation shall be by the king, by commission under the great seal. (1)

And by the statute of the 1 *G.* *st.* 2. *c.* 10. All donatives which have received or shall receive the augmentation of the governors of queen Anne's bounty, shall thereby and from thenceforth become subject to the jurisdiction of the bishop of the diocese: and [77] that no prejudice may thereby arise to the patrons of such donatives, it is provided, that no such donative shall be so augmented, without consent of the patron under his hand and seal.

[By 57 *G.* 3. *c.* 99. § 73. Every archbishop or bishop, within the

(1) Provided the visitation, &c. thereof, is not from Rome, but by H.M.'s commission, *Id.* § 23, 24.

limits of whose province or diocese respectively any benefice respectively exempt or peculiar shall be locally situate, shall exercise all the powers of this act therein as if it were not exempt or peculiar, but was subject in all respects to the jurisdiction of such archbishop or bishop; and where any such benefice is locally situate within the limits of more than one province or diocese, or between the limits of the two provinces, or of two or more such dioceses, the archbishop or bishop of the cathedral church, to whose province or diocese the parish church is locally nearest, shall have and use all the powers necessary for due execution of this act, and enforcing it with regard thereto respectively as he could have used if the same were not exempt, *&c.*; and the same for all purposes of this act shall be deemed within the limits of such province or diocese, provided that *peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese* (2), shall continue subject to the person to whom they belong as well for the purposes of this act as for all others of ecclesiastical jurisdiction. And by § 74. in every case where jurisdiction is given to the bishop of the diocese, or to any archbishop under this act, all other and concurrent jurisdiction in respect thereof shall cease, except such jurisdiction given under this act.]

Penance.

1. PENANCE is an ecclesiastical punishment, used in the discipline of the church, which doth affect the body of the penitent; by which he is obliged to give a public satisfaction to the church, for the scandal he hath given by his evil example. So in the primitive times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually injoined to do a public penance in the cathedral or parish church, or public market, barelegged and bareheaded in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the judge. So in smaller faults and scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being

Of penance and commutation in general.

(2) A license of non-residence on a benefice within an archbishop's peculiar, locally situate in another diocese, needs not to be registered in the registry of the diocese, but ought to be registered in the diocese of the archbishop. *Wynne* v. *Moore*, 5 *Taunt.* 757.

had to the quality of the offence, and circumstances of the fact; as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append.* 18.

And as these censures may be moderated by the judge's discretion, according to the nature of the offence; so also they may be totally altered by a commutation of penance: and this hath been the ancient privilege of the ecclesiastical judge, to admit that an oblation of a sum of money for pious uses shall be accepted in satisfaction of public penance. *Id.* 19.

But penance must be first injoined, before there can be a commutation; or otherwise it is a commutation for nothing. *God.* 89.

Penance of divers kinds.

2. Lindwood and other canonists mention three sorts of penance:

(1) Private; injoined by any priest in hearing confessions.

[78] (2) Public; injoined by the priest for any notorious crime, either with or without the bishop's license, according to the custom of the country.

(3) Solemn penance; concerning which it is ordained by a constitution of archbishop *Peccham*, as followeth: Whereas, according to the sacred canons, greater sins, such as incest and the like, which by their scandal raise a clamour in the whole city, are to be chastised with solemn penance; yet such penance seemeth to be buried in oblivion by the negligence of some, and the boldness of such criminals is thereby increased: we do ordain, that such solemn penance be for the future imposed, according to the canonical sanctions. *Lindw.* 339.

And this penance could be injoined by the bishop only; and did continue for two, three, or more years. But in latter ages, for how many years soever this penance was inflicted, it was performed in Lent only. At the beginning of every Lent, during these years, the offender was formally turned out of the church; the first year, by the bishop; the following year by the bishop, or priest. On every Maundy Thursday, the offender was reconciled and absolved, and received the sacrament on Easter day, and on any other day till Low Sunday: This was done either by the bishop or priest. But the last final reconciliation, or absolution, could be passed regularly by none but the bishop. And it is observable, that even down to Lindwood's time, there was a notion prevailed, that this solemn penance could be done but once: If any man relapsed after such penance, he was to be thrust into a monastery, or was not owned by the church; or however ought not to be owned according to the strictness of the canon: though there is reason to apprehend, that it was often otherwise in fact. And indeed this solemn penance was so rare in those days, that all which hath been said on this subject was rather theory than practice, except perhaps in case of heresy. *Johns. Pecch.*

3. *Boniface.* We do ordain, that laymen shall be compelled by the sentence of excommunication to submit to canonical penances, as well corporal as pecuniary, inflicted on them by their prelates. And they who hinder the same from being performed, shall be coerced by the sentences of interdict and excommunication. And if distresses shall be made on the prelates upon this account, the distrainers shall be proceeded against by the like penalties. *Lindw.* 321. By canon.

Which corporal penances Lindwood specifieth in divers instances; as thrusting them into a monastery, branding, fustigation, imprisonment. *Lindw.* 321. [79]

Othob. We do decree, that the archdeacons for any mortal and notorious crime, or from whence scandal may arise, shall not take money for the same of the offenders, but shall inflict upon them condign punishment. *Athon.* 125.

Stratford. Because the offender hath no dread of his fault, when money buys off the punishment: and the archdeacons, and their officials, and some that are their superiors, when their subjects of the clergy or laity commit relapses into adultery, fornication, or other notorious excesses, do for the sake of money remit that corporal penance, which should be inflicted for a terror to others; and they who receive the money apply it to the use of themselves, and not of the poor, or to pious uses; which is the occasion of grievous scandal, and ill example: Therefore we do ordain, that no money be in any wise received for notorious sin, in case the offender hath relapsed more than twice; on pain of restoring double of what shall have been so received within one month after the receipt thereof, to be applied to the fabric of the cathedral church; and of suspension *ab officio*, which they who receive the same, and do not restore double thereof within one month as aforesaid, shall *ipso facto* incur. And in commutations of corporal penances for money (which we forbid to be made without great and urgent cause), the ordinaries of the places shall use so much moderation, as not to lay such grievous and excessive public corporal penances on offenders as indirectly to force them to redeem the same with a large sum of money. But such commutations, when they shall hereafter be thought fit to be made, shall be so modest, that the receiver be not thought rapacious, nor the payer too much aggrieved; under the penalties before mentioned. *Lindw.* 323.

4. By the statute of *Circumspecte agatis*, 13 *Ed.* 1. *st.* 4. The king to his judges sendeth greeting: Use yourselves circumspectly concerning the bishops and their clergy, not punishing them if they hold plea in court christian of such things as be mere spiritual, that is, to wit, of penance injoined by prelates for deadly sin, as fornication, adultery, and such like; for the which sometimes corporal penance, and sometimes pecuniary is in- By statute.

joined (*n*): in which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

By the statute of *Articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 2. If a prelate injoin a penance pecuniary to a man for his offence, and it be demanded; the king's prohibition shall hold place: But if prelates injoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money; if money be demanded before a spiritual judge, the king's prohibition shall hold no place.

And by the same statute, *c.* 3. If any lay violent hands on a clerk, the amends for the peace broken shall be before the king, and for the excommunication *before a prelate*, that corporal penance may be injoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition shall not lie.

Before the prelate] It seems to be agreed by the canonists, that *archdeacons* may not inflict pecuniary penalties, unless warranted by prescription. *Gibs.* 1046.

Disposal of the commutation money.

5. Dr. Ayliffe says, that anciently the commutation money was to be applied to the use of the church, as fines in cases of civil punishment are converted to the use of the public. *Ayl. Par.* 413.

By several of the canons made in the time of queen Elizabeth, and in the year 1640, it was to be applied to pious and charitable uses; and the *Reformatio legum* directed, that it should be to the use of the poor of the parish where the offence was committed, or the offender dwelled. And there was to be no commutation at all, but for very weighty reasons, and in cases very particular. And when commutation was made, it was to be with the privity and advice of the bishop. In archbishop Whitgift's register we find that the commutation of penance, without the bishop's privity, was complained of in parliament. And it was one of King William's injunctions, that commutation be not made but by the express order and direction of the bishop himself declared in open court. And by the canons of 1640, if in any case the chancellor, commissary, or official should commute penance without the privity of the bishop; he was at least to give a just account yearly to the bishop, of all commutation money in that year, on pain of one year's suspension. *Gibs.* 1045.

[81] In the reign of queen Anne, this matter was taken into consideration by the convocation, who made the following regulations; viz. —— That no commutation of penance be hereafter accepted or allowed of, by any ecclesiastical judge, without an express consent given in writing by the bishop of the diocese, or other

(*n*) 2 *Roll. Rep.* 384.

ordinary having exempt jurisdiction; or by some person or persons to be especially deputed by them for that purpose; and that all commutations, or pretended commutations, accepted or allowed otherwise than is hereby directed, be *ipso facto* null and void.—And that no sum of money, given or received for any commutation of penance, or any part thereof, shall be disposed of to any use, without the like consent and direction in writing, of the bishop, or other ordinary having exempt jurisdiction, if the cause hath been prosecuted in their courts; or of the archdeacon, if the cause hath been prosecuted in his court. And all money received for commutation, pursuant to the foregoing directions, shall be disposed of to pious and charitable uses, by the respective ordinaries above named:—Whereof at the least one third part shall by them be disposed of in the parish where the offenders dwell. And that a register be kept in every ecclesiastical court, of all such commutations, and of the particular uses to which such money hath been applied. And that the account so registered be every year laid before the bishop, or other ordinary exempt having episcopal jurisdiction, in order to be audited by them. And that any ecclesiastical judge or officer offending in any of the premises, be suspended for three months for the said offence. *Gibs.* 1046.

But as none of these regulations are now in force, nor of the said canons made in the time of queen Elizabeth and in the year 1640; Mr. *Oughton* says, generally, that commutation money is to be given to the poor where the offence was committed, or applied to other pious uses *at the discretion of the judge.* 1 *Ought.* 213.

About the year 1735, the bishop of Chester cited his chancellor to the archbishop's court at York, to exhibit an account of the money received for commutations, and to shew cause why an inhibition should not go against him, that for the future he should not presume to dispose of any sum or sums received on that account, without the consent of the bishop. In obedience to this an account was exhibited without oath; and that being objected to, a fuller was exhibited upon oath. And upon the hearing, several of the sums in the last account were objected to as not allowable, and an inhibition prayed to the effect above. But the [82]
archbishop's chancellor refused to grant such inhibition; and was of opinion, that the bishop could only oblige an account; and so dismissed the chancellor without costs.

Pension.

PENSIONS are certain sums of money paid to clergymen in lieu of tithes. And some churches have settled on them annuities or pensions payable by other churches.

Thus in the *Registrum Honoris de Richmond*, we find a pension paid out of *Coram* or *Coverham* abbey in the county of *York* (unto which the church of *Sedburgh* was appropriated) to the prior of *Connyside* (unto whose priory the church of Orton was appropriated) for the said church of *Sedburgh*, 20*s*. *Append*. 94.

These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary. *F. N. B.* 117.

At the dissolution of monasteries there were many pensions issuing out of their lands and payable to several ecclesiastical persons; which lands were vested in the crown by the statutes of dissolution; in which statutes there is a saving to such persons of the right which they had to those pensions: but notwithstanding such general saving, those who had that right were disturbed in the collecting and receiving such pensions; and therefore by another statute, to wit, the 34 & 35 *H.* 8. *c.* 19. it was enacted, that *pensions, portions, corradies, indemnities, synodies, proxies, and all other profits due out of the lands of religious houses dissolved, shall continue to be paid to ecclesiastical persons by the occupiers of the said lands. And the plaintiff may recover the thing in demand, and the value thereof in damages in the ecclesiastical court, together with costs. And the like he shall recover at the common law when the cause is there determinable.*

[83] By the statute of Circumspecte agatis, 13 Ed. 1. *st.* 4. *If a prelate of a church, or a patron, demand of a parson a pension due to him: all such demands shall be made in the spiritual court; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.*

In pursuance of which, the general doctrine is, that pensions, as such, are of a spiritual nature, and to be sued for in the spiritual court; and accordingly when they have come in question, prohibitions have been frequently denied, or consultations granted: even though they have been claimed upon the foot of prescription. *Gibs.* 706. (3)

(3) *Collier*'s case. *Noy*, 16. 1 *Salk*. 58. *Cro. Eliz.* 675. A pension issuing out of an appropriation by presentation is suable in the spiritual court, for it could not begin but by grant and institution of spiritual persons. *Smith* v. *Wallis*, 1 *Salk*. 58. 1 *L. Raym*. 587.

But Lord Coke says, if a pension be claimed by prescription, there, seeing a writ of annuity doth lie, and that prescriptions must be tried by the common law, because common and canon law therein do differ, they cannot sue for such a pension in the ecclesiastical court. 2 *Inst.* 491.

But this hath been sometimes denied to be law. (4) And in the case of *Jones* and *Stone*, *T.* 12 *W.* *Holt* chief justice said, he could never get a prohibition to stay a suit in the spiritual court against a parson for a pension by prescription. *Wats. c.* 56. 2 *Salk.* 550.

Dr. *Gooche* v. *The Bishop of London*, *M.* 4 *G.* 2. The bishop libelled in the spiritual court, suggesting that Dr. Gooche, as archdeacon of Essex, is to pay 10*l.* due to the bishop as a *prestation*, for the exercise of his exterior jurisdiction. The Dr. moved for a prohibition, alleging that he had pleaded there was no prescription; and then that being denied, a prohibition ought to go for defect of trial. On the contrary, it was argued for the bishop, that the libel being general, it must not be taken that he goes upon a prescription; but it is to be considered in the same light as the common case of a pension, which is suable for in the spiritual court; and the nature of the demand shews it must have its original from a composition, it being a recompence for the archdeacon's being allowed to exercise a jurisdiction, which originally did belong to the ordinary. And by the court: The bishop may certainly intitle himself *ab antiquo*, without laying a prescription; and as it is only laid in general, there is no ground for us to interpose, till it appears by the proceedings that a prescriptive right will come in question; if they join issue on the plea, it will then be proper to apply: but at present there ought [84] to be no prohibition. *Str.* 879.

M. 1724. *Bailey* v. *Cornes*. In the exchequer: A bill was preferred for a pension only, payable to the preacher of Bridgnorth; and upon hearing of the cause (which was afterwards ended by compromise) it seemed to be admitted, that a bill might be brought for a pension only. *Bunb.* 183.

A bishop may sue for a pension before a chancellor, and an archdeacon before his official. *Wood. b.* 2. *c.* 2.

If a suit be brought for a pension, or other thing due of a parsonage, it seems that the occupier (though a tenant) ought to be sued; and if part of the rectory be in the hand of the owner, and part in the occupation of a tenant, the suit is to be against them both. *Wats. c.* 53.

And though there is neither house, nor glebe, nor tithes, nor

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S.C. but not S.P.; see also 3 *Salk.* 378. A pension cannot be released to the ordinary, because it is temporal. 1 *Salk.* 58.

(4) See *Johnson* v. *Ryson*, 12 *Mod.* 417.

other profits, but only of easter-offerings, burials, and christenings; yet the incumbent is liable to pay the pension. *Hardr.* 230.

If an incumbent leave arrearages of a pension, the successor shall be answerable; because the church itself is charged, into whatsoever hand it comes. *Cro. Eliz.* 810. (5)

By 26 *G.* 8. *c.* 3. § 21. When incumbents pay any pension to their predecessors out of their livings, they may retain the tenth thereof, and shall by virtue hereof be acquitted of such tenth, and may plead this act in discharge thereof. By § 22. no pension shall be assigned by the ordinary, or by any other agreement or otherwise, upon resignation of any promotion spiritual, above the value of the third part thereof shall be assigned to any person spiritual, the incumbent shall not be compelled to pay above such third part, but shall be quitted of the same; and by § 23. abbots or priors paying pensions to their predecessors above 40*l.* may deduct one half.

Pentecostals.

PENTECOSTALS, otherwise called *Whitsun-farthings,* took their name from the usual time of payment, at the feast of pentecost. These are spoken of in a remarkable grant of king Henry the eighth to the dean and chapter of Worcester; in which he makes over to them all oblations and obventions, or spiritual profits, commonly called whitsun-farthings, yearly collected or received of divers towns within the archdeaconry of Worcester, and offered at the time of pentecost. From hence it appears that pentecostals were oblations; and as the inhabitants of chapelries were bound, on some certain festival or festivals, to repair to the mother church, and make their oblation there, in token of subjection and dependance; so, as it seems, were the inhabitants of the diocese obliged to repair to the cathedral (as the mother church of the whole diocese) at the feast of pente-
[85] cost. Something like this was the coming of many priests and their people in procession to the church of St. Austin in Canterbury, in whitsun-week, with oblations and other devotions; and in the register of Robert Reed, who was made bishop of Chichester in the year 1396, there is a letter to compel the inhabitants of the parishes within the archdeaconry of Chichester, to visit their mother church in whitsun-week. *Gibs.* 976. 1. *Warn.* 339.

These oblations grew by degrees into fixed and certain pay-

(5) *Trinity College, Cambridge,* v. *Tunstall.*

ments; from every parish and every house in it; as appears not only from the aforementioned grant of king Henry the eighth, but also from a remarkable passage in the articles of the clergy in convocation in the year 1399; where the sixth article is a humble request to the archbishops and bishops, that it may be declared, whether peter-pence, the holy-loaf, and pentecostals were to be paid by the occupiers of the lands, though the tenements were fallen or not inhabited, according to the ancient custom, when every parish paid a certain quota. *Gibs.* 976.

These are still paid in some few dioceses; being now only a charge upon particular churches, where by custom they have been paid. *Ken. Par. Ant.* 596. *Deg. p.* 2. *c.* 15.

And if they be denied, when they are due, they are recoverable in the spiritual court. *Gibs.* 977. (*o*)

Perambulation. See Parish.

Perinde valere.

PERINDE valere was a writ of dispensation granted by the pope to a clerk admitted to a benefice, although incapable; taking that name from the words of the dispensation, which made it *perinde valere*, that is, to be as effectual to the party, as if he were capable. *Gibs.* 87.

Perjury. (*p.*) [86]

IF perjury be committed in a temporal cause, it is punishable only in the temporal courts; but where it is committed in a

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(*o*) 1 *P. Wms.* 657.

(*p*) Perjury before the conquest was punished by corporal chastisement, banishment, and sometimes death. 3 *Inst. c.* 74. 16 *Vin.* 310. Afterwards the king's council used to assemble and punish perjuries at their discretion; and the spiritual court proceeded against the offenders *pro læsione fidei Cro., Eliz.* 521. Unlawful oaths are mentioned as one reason for the institution of the court of star-chamber in 3 *H.* 7. *c.* 1.; and prosecutions in that court for this crime were very frequent both before and after the 5 *Eliz. c.* 9. which inflicted statutable penalties upon persons guilty of perjury, and those who should procure them to commit it; and gave an action of 20*l.* against the former, and 40*l.* against the latter, to the party grieved. The court of star-chamber was afterwards abolished by 16 *C.* 1. *c.* 10.

spiritual cause, the spiritual judge hath authority to inflict canonical punishment, and prohibition will not go. *Gibs.* 1013. 1 *Ought.* 9. (*q*)

For by the statute of *circumspecte agatis*, 13 *Ed.* 1. *st.* 4.—— For breaking an oath, it hath been granted, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for the punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

For although the case be spiritual, and the perjury is committed in the spiritual court; yet the judge there can only punish *pro salutæ animæ*: but the party grieved by such perjury must recover his damages at the common law. *Gibs.* 1013. (*r*)

[87] By the statute of perjury, 5 *Eliz. c.* 9. § 11. that act shall not extend to any spiritual or ecclesiastical court; but such offender as shall be guilty of perjury, or subornation of perjury, shall and may be punished by such usual and ordinary laws as heretofore hath been, and yet is used and frequented in the said ecclesiastical court.

In the statute of the 5 *Eliz. c.* 23. concerning the writ *de excommunicato capiendo*, perjury in the ecclesiastical court is specified as an offence (amongst others) for which a person may be excommunicated. [And conviction of perjury, either in the tem-

which in § 2. recites, that all matters examinable there, might be remedied and redressed by the common law; and the common law being since aided by the 2 *G.* 2. *c.* 25. and 23 *G.* 2. *c.* 11. (the first of which statutes empower the court to send the offender to the house of correction, or to transport him for seven years, and the second facilitates the process of conviction) indictments for this crime are chiefly now at common law. See 4 *Bl. Com.* 137. *Hawk. Pl. Cr. ch.* 69.

(*q*) *Keilw.* 39. *b.* 7.

(*r*) If one makes a false oath, the party is punishable for it by an *action on the case*, if it be not perjury for which he may be indicted. There is a difference between a *false oath* and *perjury*; for one is judicial, the other extra-judicial; and the law inflicts greater punishment for a false oath made in a court of justice than elsewhere, because of the preservation of justice. Per *Rolle* C. J. in *Howell* v. *Gwinn*. *Stiles*, 337. If the party grieved (by false affidavit) receive damages either by any wrongful proceeding of the judge, or misfeasance, or nonfeasance, or falsity of any minister, or by unjust prosecution of the party, he may have an action on the case, and recover damages. 12 *Rep.* 128. *Carth.* 487. But one cannot have an action on the case against a witness for swearing that a fountain of silver worth 500*l.* was only worth 180*l.*; by reason of which false oath, it was insisted the jury gave 200*l.* damages instead of 500*l.* For if this were suffered, every witness might be drawn in question. *Damport* v. *Sympson*, *Cro. Eliz.* 520. 1 *Vin.* 592.

poral or ecclesiastical courts, is a cause of deprivation of benefice. Deprivation, *in notis.*]

E. 11 *W.* Bishop of *St. David's* case. By *Holt* chief justice: It has been a question, whether perjury in the spiritual court can be tried in the temporal: and in all the cases where it hath been, the persons have been acquitted, and so it hath been ended, but it is not yet settled. *L. Raym.* 451.

M. 4 *G. K.* and *Lewis.* An information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it, till he had been convicted of the simony. *Str.* 70. (*s*)

Perpetual cure. See Curate.
Pews in the church. See Church.

Peter-pence. [88]

PETER-PENCE was an annual tribute of one penny paid at Rome out of every family, at the feast of St. Peter. *Gibs.* 87.

Physicians.

1. *WETHERSHEAD.* Forasmuch as the soul is far more precious than the body, we do prohibit under the pain of anathema, that no physician for the health of the body, shall prescribe to a sick person any thing which may prove perilous to the soul. But when it happens that he is called to a sick person, he shall first of all effectually persuade him to send for the physicians of the soul; that after the sick person hath taken care for his spiritual mendicament, he may with better effect proceed to the cure of his body. And the transgressors of this constitution shall not escape the punishment appointed by the council. *Lind.* 330.

That is, by the council of Lateran, under Innocent the third;

(*s*) There are authorities and *dicta* to shew, that perjury in any court, not excepting courts ecclesiastical, may be punished by indictment or information in the temporal courts; see 5 *Mod.* 348. 2 *Roll. Ab.* 257. 16 *Vin. Ab.* 313, 314.; but it must be at common law, as it is aided by stat. 2 *G.* 2. *c.* 25. and 23 *G.* 2. *c.* 11. and not upon the stat. of *Eliz.*

from the canons of which council this constitution was taken: which punishment is, a prohibition from the entrance of the church until they shall have made competent satisfaction *Johns. Wethersh.*

[89] 2. By the 3 *H. c.* 11. No person within the city of London, nor within seven miles of the same, shall take upon him to exercise and occupy as a physician or surgeon, except he be first examined, approved, and admitted by the bishop of London, or by the dean of Paul's for the time being, calling to him or them four doctors of physic, and for surgery other expert persons, in that faculty, and for the first examination such as they shall think convenient, and afterwards always four of them that have been so approved; upon pain of forfeiture, for every month that they do occupy as physicians or surgeons, not admitted nor examined after the tenor of this act, of *5l.*, half to the king, and half to him that shall sue. And that no person out of the said city and precinct of seven miles of the same, except he have been as is aforesaid approved in the same, take upon him to exercise and occupy as a physician or surgeon, in any diocese within this realm; unless he be first examined and approved by the bishop of the same diocese, or (he being out of the diocese) by his vicar general, either of them calling to them such expert persons in the said faculties as their discretion shall think convenient, and giving their letters testimonial under their seal to him that they shall so approve; upon like pain to them that occupy contrary to this act (as is aforesaid) to be levied and employed after the form before expressed.

Provided, that this act shall not be prejudicial to the universities of Oxford or Cambridge, or either of them; or to any privileges granted to them.

Incorporated in London.

3. (A) By the 14 & 15 *H.* 8. *c.* 5. Physicians in London and within seven miles thereof are incorporated with power to make statutes for the government of the society; and no physician shall practise within the said limits, till admitted by the president and community under their common seal; on pain of *5l.* a month, half to the king, and half to the society. And four censors are to be chosen yearly, who shall have the ordering of the practitioners within the said limits, and the supervising of medicines; with power to fine and imprison. (6)

And it is further enacted, that whereas in dioceses of England out of London, it is not light to find always men able sufficiently to examine (after the statute) such as shall be admitted to exercise physic in them: therefore no person shall be suffered to exercise or practise in *physic* through England, until such time as he be examined at London, by the president and three of the elects of the said society; and to have from them letters testi-

monial of their approving and examination; except he be a graduate of Oxford or Cambridge, which hath accomplished all things for his form without any grace. (*t*)

But as to *surgeons*, the law remained as before; that they shall be licensed by the bishop of the diocese, or his vicar general respectively.

[By 32 *H.* 8. *c.* 42. The barbers and surgeons of London were united and incorporated, and exempted from bearing arms, or serving on inquests or offices. But they were not to use each other's trade. By 18 *G.* 2. *c.* 15. the union was dissolved; and the surgeons of London were made a separate corporation, with power to enjoy the same privileges as by former acts or grants. See 4 *Burr.* 2133. (7) By 25 *G.* 2. *c.* 37. The bodies of murderers convicted and executed in London or Middlesex shall be delivered to Surgeons' Hall; and in other counties to such surgeons as the judge shall direct.] [Surgeons.]

In the case of the college of physicians against *Levett*, *E.* 11 *W.* The plaintiffs brought an action of debt against the defendant for 25*l.* for having practised physic within London five months without licence. Upon *nil debet* pleaded, it was tried before Holt chief justice at Guildhall; and the defence was, that he was a graduate doctor of Oxford. But it was ruled by *Holt*, upon consideration of all the statutes concerning this matter, that he could not practise within London or seven miles round, without licence of the college of physicians, and by his direction a verdict was given for the plaintiffs. *L. Raym.* 472. (*u*)

And the like was adjudged on a special verdict, *M.* 4 *Geo.* 1717; in the case of Dr. *West*, who was a graduate of Oxford. *Id.* 10 Mod. 353. [91]

[3. (B) By the 32 *H.* 8. *c.* 40. All members of the college of physicians in London are discharged of keeping watch or ward, or being chosen constables, &c. and are enabled to practise surgery. And it shall be lawful for the president and fellows of the said college yearly to chuse four of their number, who shall have power, after being sworn, to enter the house of any apothecary [May search for faulty drugs.]

(*t*) *Vid.* 12 *Mod.* 602.

(7) *Sharpe* q. t. v. *Law.*

(*u*) See also Dr. *Bonham*'s case, 8 *Rep.* 107. where seven rules are laid down for the better direction of the president and commonalty of the college for the future; and note, that under the charters granted to the college, and confirmed by acts of parliament, they may fine and imprison any person for *bad practice* as a physician within the limits of their jurisdiction. *Groenvelt* v. *Burwell*, *Ld. Raym.* 454. *Com.* 76. 12 *Mod.* 386. For further information as to the rules of the college, see *Rex* v. Dr. *Askew et al.* 4 *Burr.* 2186; and note, that a physician cannot maintain an action for his fees, they being honorary. *Chorley* v. *Belcot*, 4 *T. Rep.* 317.

in the said city, to search and view his wares and drugs; and such as they shall find defective and corrupted, having called to their assistance the wardens of the mystery of apothecaries, or one of them, shall cause to be burnt, or otherwise destroyed. Apothecaries denying entrance, to forfeit *5l.* And by 1 *Mar.* § 2. *c.* 9. if the wardens of the apothecaries' company shall neglect to go with the president, or the said four physicians so elected, they may search and punish apothecaries for faulty drugs without their assistance; and all persons resisting to forfeit 10*l.*]

4. By the 34 & 35 *H.* 8. *c.* 8. Every person being the king's subject, having knowledge and experience of the nature of herbs, roots and waters, or of the operation of the same, by speculation or practice, to use and minister in and to any *outward* sore, uncome, wound, apostemations, outward swelling or disease, any herb or herbs, ointments, baths, pultess and emplaisters, according to their cunning, experience, and knowledge, in any of the diseases, sores and maladies aforesaid, and all other like the same, or drinks for the stone and strangury, or agues; without suit, trouble, penalty, or loss of their goods: the foresaid statute, or any other act, ordinance, or statute notwithstanding. [In *Laughton* v. *Gardner*, *Cro. Jac.* 121. 159. this act is considered as repealed *quoad* the college of physicians by 1 *Mar. Sess.* 2. *c.* 9. which confirms the 14 & 15 *H. c.* 5. and thereby abrogates all subsequent acts contrary to it; and though this was afterwards doubted in *Butler* v. *The College of Physicians*, *Cro. Car.* 256., it seems to receive some confirmation from the 10 *G.* 1. *c.* 20. since expired; which, though it recites former acts on the subject, does not mention the 34 & 35 *H.* 8.]

[Apothecaries. By 6 & 7 *W.* 3. *c.* 4. Practising members of the London Society of Apothecaries, and apothecaries acting as such in England, Wales, and Berwick, after serving seven years' apprenticeship, are exempted from serving parish offices and on juries. By 55 *G.* 3. *c.* 194. The master, wardens and assistants of the Society of Apothecaries are empowered to search apothecaries' shops for bad medicines, to examine apothecaries, and their assistants, and to execute many other provisions for better regulating the art.]

THE *pie* was a table to find out the service belonging to each day. *Gibs.* 263.

Pious uses. See **Charitable uses.**

Plays in the church or churchyard. See **Church.**

Plays in the universities. See **Colleges.**

Plough-alms. [93]

THE *plough-alms* was a kind of oblation, being most commonly a penny for every plough, to be paid between easter and whitsuntide. 2 *Still.* 177.

Plurality.

See **Lapse.**

1. BY a canon made in the council of Lateran, holden under pope Innocent the third, in the year of our Lord 1215, it is ordained, that whosoever shall take *any benefice* with cure of souls, if he shall before have obtained a like benefice shall *ipso jure* be deprived thereof; and if he shall contend to retain the same, he shall be deprived of the other (8), and the patron of the

Restraints of plurality by canon.

(8) *Holland*'s case, 4 *Rep.* 75. *Brazen-nose College* v. *The Bishop of Salisbury*, 4 *Taunt.* 831. So though the second benefice be under 8*l. per annum*, *Shute* v. *Higden*, *Vaugh.* 131. *The King* v. *Bishop of London and Baldcock*, *Jones*, 404.; and thereupon the patron may, if he will, present without sentence of deprivation, *Cro. Car.* 357. 2 *Wils.* 174. *The King* v. *Priest*, *Jones*, 337. and a subsequent dispensation obtained pursuant to 25 *H.* 8. *c.* 21. is too late, and does not take away the right of presentation vested in the patron, *Jones*, 404. It seems that the first benefice will be void on *institution* to the second before *induction;* though a lapse does not occur till six months after *induction;* for *induction* to the second is sufficient notice to the patron of the first. *Moor.* 448. *Wolverstan* v. *Bishop of Lincoln.* 2 *Wils.* 174. 200. 3 *Bur. Rep.* 1504. S. C.; see also that a church is full by *institution*. *Colt and Another* v. *Bishop of Coventry*, *Hob.* 154. *Goldsb.* 164. 2 *Wils.* 183—191. *argued.* The first benefice is *so* void that a grant of the advowson or next presentation made after it will be void, 2 *Wils.* 174.; nor can he sue for tithes, *Cro. Car.* 357. *Jones*, 337, 338. 340. except where the first is under 8*l. per an.*, and then even only after deprivation under canon law, *ib.*, for the first is then

former, immediately after his accepting of the latter, shall bestow the same upon whom he shall think worthy. *Hughes, c.* 16. *Gibs.* 903.

Othob. Before institution, it shall be inquired, whether the presentee hath any other benefice with cure of souls; and if he hath such benefice, it shall be inquired, whether he hath a dispensation: And if he hath not a sufficient dispensation, he shall by no means be admitted, unless he do first make oath, that immediately upon his taking possession of the benefice unto which he is instituted, he will resign the rest. Whereupon he who granteth institution shall immediately give notice to the bishops in whose dioceses such former benefices shall be, and also to the patrons that they may dispose of the same. *Athon.* 129.

Othob. When confirmation is to be made of the election of a bishop, amongst other articles of inquiry and examination according to the direction of the canons, it shall be diligently inquired, whether he who is elected had before his election several benefices with cure of souls; and if he be found to have had such, it shall be inquired whether he hath had a dispensation; and whether the dispensation (if he shall exhibit any) is a true dispensation, and extendeth to all the benefices which he possessed. *Athon.* 133.

According to which constitution we find, in the times of the archbishops Peccham and Winchelsea, that confirmation was denied to three bishops, by reason of pluralities without proper dispensation. *Gibs.* 905.

[94] *Peccham.* He who shall have more benefices than one with cure of souls, without dispensation, shall hold only the last; and if he shall strive to hold the rest, he shall forfeit all. And it is further decreed, that he who shall take more benefices than one,

void at election of the patron, *Boteler* v. *Allington*, 3 *Atk.* 455. But *Watson, ch.* 3. says, "the first benefice is not avoided by *induction* to another benefice with cure, if the incumbent do not send the thirty-nine articles, for he never was possessor of the second:" but the acts enforcing this requisite, provide *deprivation ipso facto*, for neglect thereof, which implies full possession of the benefice; and see *Vaughan*, 131. Watson goes on to say, "that the first benefice is not "avoided if the incumbent is presented to the second by simony, or "does not subscribe the articles before the ordinary himself." In *Bulwer* v. *Bulwer*, 2 *B. & A.* 470. it was held, that the parson is by *induction* put in *possession* of a part for the whole, and may maintain action for trespass on glebe, though he has not taken actual possession of it.

Union of the second benefice to the first, after institution to the first, will not save the avoidance of the first, *Hob.* 158.; nor will a pardon by the king of his title by lapse restore it. *The King* v. *Priest, Jones*, 339.

having cure of souls, or being otherwise incompatible, without dispensation apostolical, either by institution or by title of commendam, or one by institution, and another by commendam, except they be held *in such manner as is permitted by the constitution of Gregory* published in the council of *Lyons*; shall be deprived of them all, and be *ipso facto* excommunicated, *and shall not be absolved but by us or our successors or the apostolic see.* Lind. 137.

Having cure of souls] Whether it be a cathedral or parochial church or a chapel having cure of the parishioners, either *de jure* or *de facto*; so that there be a parish, wherein he can exercise parochial rites: also, whether it be a dignity or office, or church; as there are many archipresbyters, archdeacons, and deans, who have no church of their own, yet they have jurisdiction over many churches. *Lind.* 135.

Or being otherwise incompatible] Namely, dignities, parsonages, and other ecclesiastical benefices, which require personal residence either by statute, privilege, or custom. *Lind.* 137.

In such manner as is permitted by the constitution of Gregory] Namely, that he to whom the benefice is granted in commendam be of lawful age, and a priest; and that it be one only, and of evident necessity, or advantage to the church, and to continue no longer than for six months. *Lind.* 137.

And shall not be absolved but by us or our successors, or the apostolic see] And by another constitution of the same archbishop, if any shall otherwise absolve them, they shall be accursed. *Lind.* 339.

But after all, these canons and constitutions were not intended to hinder or take away pluralities; but to render dispensations necessary: for a clerk was allowed to hold as many dignities or benefices as he could get, with the pope's dispensation; which was easily obtained from his legate or nuncio residing here, on paying the sums required. *Johns.* 91.

Restraints of plurality by statute.

2. By the 21 *H.* 8. *c.* 13. (9) *If any person having one benefice* with cure of souls, being *of the yearly value of* 8*l. or above, accept and take any other* with cure of souls, *and be instituted and inducted in possession of the same;* then and immediately after such possession had thereof, the first benefice shall be adjudged in law to be void. [95] *And it shall be lawful to every patron, having the advowson thereof, to present another,* and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; *any licence, union, or other dispensation to the contrary notwithstanding;* and *every such licence, union or dispensation to be obtained contrary to this present act, of what name or quality soever they be, shall be utterly void and of none effect.* And if any person or persons contrary to this pre-

(9) Confirmed 25 *H.* 8. *c.* 21. § 21. act for dispensations.

sent act, *shall procure and obtain at the court of Rome* or elsewhere any licence, union, toleration, or dispensation, to receive and take any more benefices with cure than is above limited; every such person or persons, so suing for himself, or receiving and taking such benefice by force of such licence, union, toleration, or dispensation, that is to say, the same person or persons only, and none other, shall for every such default incur the penalty of 20*l.* and also lose the whole profits of every such benefice or benefices as he receiveth or taketh by force of any such licence, union, toleration, or dispensation; half to the king, and half to him that will sue for the same in any of the king's courts. § 9, 10, 11.

If any person] Although bishops are not within this act, otherwise than as commendataries, that is, having two benefices with cure, either by retainder, or *de novo*; yet it is a general law, which ought to be taken notice of without pleading, by the same reason that the statute of the 13 *Eliz.* *c.* 10. concerning leases of the clergy, hath often been adjudged a general law, though bishops are not included in it. *Gibs.* 906.

Having one benefice] So as that he hath been instituted, although he hath not been inducted into the same; for if he taketh a second benefice after such institution, the first is void, as much as it had been taken after induction also. *Gibs.* 906.

Of the yearly value of 8*l.* *or above*] According to the valuation in the king's books; for so it was unanimously resolved by the court of common pleas in the 23 *C.* 2. and before that in the 8 *C.* 1. by the same court, in the case of *Drake* v. *Hill* (1); which therefore is at this day taken for law, notwithstanding the two more ancient opinions to the contrary, one in *Dyer*, 7 *Eliz.* and the other in the case of *Bond* and *Trickett* in the 43 *Eliz.* *Gibs.* 906. *Wats.* *c.* 2.

Of 8*l.* *or above*] If such first benefice is under the yearly value of 8*l.* in the king's books, the same is not within this statute, but rests upon the law of the church, as it was before the statute. *Gibs.* 906. [*see* 93. *note* (8).]

[96] *Accept and take any other*] It is not material in this case, of what value the second church is, or whether rated in the king's books at all: for the voidance will take place equally when the second is under, as when it is above 8*l.* a-year. *Gibs.* 906. (2)

And be instituted and inducted in possession of the same] Although the expression is copulative, and should therefore imply,

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(1) *Cro. Car.* 456. Sir *T. Jones*, 19.

(2) *Boteler* v. *Allington*, 3 *Atk.* 455. *Vaugh.* 131. *Jones*, 404. a dignity as dean of a cathedral without cure is not within these words: nor does a bishop vacate a benefice with cure *by this statute*, but at common law. *Hob. Rep.* 157. 1 *Leon. Rep.* 316. *Semb. contr.*, and not till consecration, *Pal.* 346.

that the voidance which follows thereupon doth not take place till after induction; yet it hath been often adjudged, that if one is instituted, and then obtains dispensation, and after that is inducted, the dispensation comes too late; not only because by institution the church is full of the incumbent, and one cannot have a dispensation, to *take* and *receive* (as the words of the act are) what he had before; but also because by institution he hinders others from being presented: and so by obtaining institution to many churches, with sequestration of the profits of them, the intent of this statute might be utterly frustrated. *Gibs.* 906. (3)

And it shall be lawful to every patron, having the advowson thereof, to present another] If the first benefice was of less value than 8*l.* a-year; yet by his acceptance of a second with cure, it is at this day *in jure* void by the received canon law: and there needs not any sentence declaratory in the spiritual court, to make way for the patron's presentation; for he may immediately thereupon (without either deprivation or resignation) present a new incumbent to the said church, and require his admission; and if the bishop doth refuse the patron's clerk, a *quare impedit* lies for the patron. But some opinions are, that the church is not void but by deprivation; and that the taking of a second benefice with cure in such case, until deprivation, is no cession: But this is to be understood, that it is no cession to the disadvantage of the patron; so as to make a lapse incur from the time of such cession, no notice having been given to the patron thereof. For until after such clerk shall have been actually deprived of his first benefice, and notice thereof given to the patron; he, though he may, yet need not to present: but then after such deprivation, the church is void *in facto* and *in jure*, so that he must at his peril present. *Wats. c.* 2.

And if an incumbent of a church with cure under 8*l.* a-year doth take a second benefice with cure, in which he is also instituted and inducted (no dispensation being obtained for the holding of them both), by which the first is void against the patron, so that he may present (as before is shewed), but before the [97] patron doth present upon such avoidance, the archbishop, by force of this statute, doth grant to the clerk a licence *perinde valere*, to hold the first with the second benefice; this is not a good licence (although confirmed according to the statute), to take away the patron's presentment, though his church was only void by force of a canon, and not by statute: for by the canon the first benefice was so void, that the patron might have presented before any deprivation; and after the patron hath once a

(3) *Digby's* case, 4 *Rep.* 78. but this case extends only to *dispensations*, and the second living is not accepted so as to create a *lapse* till induction *per cur.* 1 *Bla. Rep.* 494.

title to present, this title cannot be taken away from him by a subsequent licence, unless such a licence could make a void church full. *Wats. c.* 2.

But if any person having one benefice with cure of souls, being of the yearly value of 8*l.* or above, do accept and take another benefice with cure of souls, and be instituted and inducted in possession of the same (although the last benefice be but of 3*l.* value); immediately after such possession had thereof, the first benefice is not only void in law but *in facto* also: so that the patron thereof must present to a living of such value, so void, within six months (without expecting notice from the ordinary) to avoid the lapse; it being then not only void by canon law but also by act of parliament, in which all men are parties. But he need not (unless notice be duly given) present till such time as his clerk is inducted into another benefice. For though by his institution he hath the cure of souls, and the church is full to several purposes; yet the words of the statute are, "and be in-"stituted and inducted in possession of the same;" so that until he be inducted, there is no cession by this statute, but only by the canon law; by which law in such case also he may be deprived. *Wats. c.* 2. (*x*)

But the patron, if he pleaseth, may present so soon as his clerk is instituted into another benefice incompatible, although he hath no notice from the ordinary of any cession or deprivation made of the first benefice, by reason of his acceptance of another by institution; and though he was only instituted into the first benefice, and not inducted: or else, if he pleaseth, he may sue such person in the court christian, to have him deprived by sentence, in this, as well as in any other case where the living is void by the canon law only. *Wats. c.* 2.

[98] But this rule, that the accepting of a second benefice that is incompatible, doth make a cession or absolute avoidance of the former, hath its exceptions: As, 1. If a person having a benefice incompatible, be admitted, instituted, and inducted into a second benefice incompatible also, but doth not subscribe the articles according to the statute; his first benefice is not void, because by reason of that neglect, he was never incumbent of the second. The like law seemeth to be, if a man hath obtained a second benefice incompatible with his former, by a simoniacal contract; for in such case also, his presentation or collation, institution, and induction, are utterly void and of none effect in law: However, the canon law, unless a pardon intervene, will reach him in this case of simony; for by that he may be deprived. 2. If he that hath a benefice incompatible, before he takes another, being duly qualified, doth obtain a sufficient dispensation, to hold at one and the same time more than one of such benefices as are incompatible:

(*x*) See Deprivation *in notis.*

for by dispensation, a man at this day with us (though he be not qualified by degree in the university, retainer, or birth) may hold as many benefices without cure, of what value soever, as he can get; all of them, or all but the last, being under the value of 8*l.* a-year. *Wats. c.* 3.

Any licence, union, *or other dispensation to the contrary notwithstanding*] The *union* here spoken of, is meant of a temporary union for the life of the incumbent; instances of which are common both before and since the reformation. *Gibs.* 907.

And every such licence, union, or dispensation contrary to this act, shall be utterly void and of none effect] One being possessed of two benefices by dispensation according to this statute, did afterwards by a trialty (or a dispensation to hold three) obtain a third benefice, and enjoyed all the three; and Dyer says, that divers justices and serjeants were of opinion, that the first of the three was void, and the profits of the third forfeited by this clause, and that only the second remained to him. *Gibs.* 907. *Dyer* 327.

Also in the case of *the king* against the bishop of *Chichester*, where one had two benefices with cure, by dispensation, and then took a third with cure (and, as it seemeth, without dispensation); it is said to have been adjudged, that both the two first shall be void. *Gibs.* 907. *Noy.* 149.

And the words of Hobart are; I hold, if a man take a trialty which is not allowed him, he cannot by that take two benefices, because his dispensation is void. *Hob.* 158.

The rule of the canon law is, that if a person having two bene- [99]
fices incompatible, shall by dispensation accept a third, and be in quiet possession thereof, the two first shall be *ipso facto* void. *Gibs.* 907.

Upon all which considerations, if a third benefice is to be taken by one who already holds two by dispensation, the best way is to determine which of the two he will hold with the third, and to make the other void by resignation, before he accepts the third. *Gibs.* 907.

[By 36 *G.* 3. *c.* 83. § 4. "Whereas doubts have been lately entertained (4) whether the *acceptance of such augmented churches, curacies, and chapels*, has rendered voidable in law such other benefices as the incumbents possessed before their acceptance of the same: and whereas it is fit *that many incumbents who have accepted such churches, &c., should be quieted in the possession of the benefices they enjoyed before the acceptance of the same.*" It is enacted and declared, That all such benefices as were held in conjunction with augmented cures *before* 14th *May* 1796, shall

(4) Sir *W. Scott*'s opinion, on 9th May, 1793, was, that such augmented cures were within the statute of pluralities. See MSS. Cas. 38.

continue to be held by the present incumbents therewith: and that it shall not be lawful to present to the said benefices until they shall become void or voidable by death or cession, or by other lawful cause of avoidance arising after the passing of this act. The 47 *G.* 3. *Sess.* 2. *c.* 75. recited this provision and extended a like protection to incumbents of benefices who had unwarily accepted such augmented churches, &c. *after* 14th *May* 1796: that act was repealed by 48 *G.* 3. *c.* 5, which continued a like protection to incumbents of churches, and so accepted up to 21st *Jan.* 1808.]

Shall procure and obtain at the court of Rome] In the catalogue of faculties which were grantable at Rome in the times of popery (besides the common dispensations to hold two, three, or four benefices incompatible) are these three that follow: 1. A dispensation to whatsoever and how many soever benefices incompatible to the value of 500*l.* a year. 2. To the value of 1000*l.* a year. 3. Without any restriction. The price of each rising gradually, according to the degree of favour and profit. *Gibs.* 907.

And how much the practice, as well as law, of holding pluralities was altered by this statute, from what it was whilst the right of dispensation rested in the pope, will appear (amongst many other such like which might be mentioned) from the famous instance of Bogo de Clare, rector of St. Peter's in the East in Oxford; who, in the eighth year of king Edward the first, was presented by the earl of Gloucester to the church of Wyston in the county of Northampton, and obtained a dispensation to hold the same, together with one church in Ireland, and fourteen other churches in England in nine different dioceses; all which benefices were valued at that time at 268*l.* 6*s.* 8¼*d.* *Ken. Par. Ant.* 292. *Gibs.* 907. *Wood's Hist. et Antiq. Univ. Oxon.* 116.

[Finally by the 36 *G.* 3. *c.* 83. § 3. which recites the expediency, that churches, curacies, and chapels, augmented by the governors of Queen *Anne's* bounty, and declared to be *perpetual cures and benefices* by 1 *G.* 1. *stat.* 2. *c.* 10. should be subject to the same rules as benefices, with respect to the avoidance of other benefices; *it is enacted*, that such augmented churches, curacies, and chapels shall be considered in law as benefices presentative, so that the licence thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings in like manner as institution to the said benefices.]

[59 *G.* 3. *c.* 40., after reciting in the preamble, That whereas certain clergy lawfully possessed of two benefices by dispensation, have afterwards, without having resigned or otherwise vacated one of them, obtained a new dispensation to hold another benefice with one of those of which they were before possessed, and have been therefore put in possession of such other [*viz.* 3*rd.*]

benefice, and whereas doubts have arisen, whether for want of previous resignation or other vacation by such clergy of such one of the benefices before held by them by dispensation as was not intended to be held with the last taken benefice, the subsequent dispensation was valid in law, and whether not only the benefice intended to be made void, but also the other benefice so previously possessed by such clergy, and intended to be held by them with the other benefice by virtue of such subsequent dispensation, have not been rendered void. Enacts by § 1. That in every such case which has occurred before 14 *June* 1819, no patron, &c. shall present to such benefice so rendered void by reason of such avoidance as above. By § 2. Incumbents of such benefices may enjoy the emoluments thereof, and all their acts and deeds relating thereto, are valid. And § 3. is a proviso for the patron's right to nominate to such benefice on the death or resignation, &c. of the incumbent.]

Dispensation of plurality by statute.

3. By the aforesaid statute of the 21 *H.* 8. *c.* 13. it is enacted, [100]
that all spiritual men being of the king's council, may purchase licence or dispensation, to take, receive, and keep three *parsonages or benefices* with cure of souls: and all other being the king's chaplains, and not sworn of his council, the chaplains of the queen, prince, or princess, or any of the king's children, brethren, sisters, uncles, or aunts, may semblably purchase licence or dispensation, and receive and keep two parsonages and benefices with cure of souls: Every archbishop and *duke* may have six chaplains; every *marquis* and *earl* five; viscount, and other bishop, four; chancellor of England for the time being, baron and knight of the garter, three; every duchess, marchioness, countess, and baroness, being widows, two; treasurer, controller of the king's house, the king's secretary, and dean of his chapel, the king's amner, and master of the rolls, two; chief justice of the king's bench, one; warden of the five ports, one; whereof every one may purchase licence or dispensation, and receive, have, and keep two parsonages or benefices with cure of souls. And the brethren and sons of all temporal lords, which are born in wedlock, may every of them purchase license or dispensation to receive, have and keep as many parsonages or benefices with cure, as the chaplains of a duke or archbishop. And the *brethren and sons born in wedlock of every knight*, may every of them purchase license or dispensation, and receive, take, and keep two parsonages or benefices with cure of souls. § 13. ——— 21. (5)

Parsonages or benefices] Dispensations were granted heretofore, for such a number of benefices, without specifying the particulars; and sometimes with an additional power to exchange, and take

(5) Bishops suffragans may hold *two* benefices with cures, 26 *H.* 8. *c.* 14. § 8. and see *Com. Dig.* tit. *Prerogative* (D 18.) *Esglise* (N. 5, 6, 7, & 9.)

others; only keeping within the number in point of possession, at one and the same time. But the later and safer way hath been, to grant dispensation only for preventing the voidance of a
[101] benefice in possession, by the taking of a second, however these words may be capable of a larger interpretation. *Gibs.* 907.

Every duke, marquis, earl, &c.] And although such duke, marquis, earl, or the like, be minors, and under age; yet they may retain chaplains within this act; as was adjudged in the case of the queen and the bishop of *Salisbury;* even though the lord admiral, in whose custody the minor was, might retain chaplains in his own right. (6) 4 *Rep.* 119. *Gibs.* 908.

But if the son and heir apparent of a baron, or such like, retaineth a chaplain, and his father dieth, and the chaplain purchaseth dispensation; such retainer will not avail, because it was not available at the beginning. (7) 4 *Rep.* 90.

And if the person who retained dies, or is removed, or is attainted, before any effect of the retainer, it is gone, and shall have no effect afterwards: but if it taketh effect before, it continues good, notwithstanding death, or attainder, or removal. *Gibs.* 908.

Brethren and sons born in wedlock of every knight] But not brethren or sons of baronets; which dignity hath been created since the making of this act. *Gibs.* 908. That is, if such baronets are not also knights. (8)

§ 22. Provided, that the said chaplains so purchasing, taking, receiving, and keeping benefices with cure of souls, as is aforesaid, shall be bound to have and exhibit, where need shall be, *letters under the sign and seal* of the king or other their lord and master, testifying whose chaplains they be; and else not to enjoy any such plurality of benefices by being such chaplain: any thing in this act notwithstanding.

Letters under the sign and seal] Which may be in this form: "Know all men by these presents, that I the right honourable "A. lord ——— baron of ——— have admitted, constituted, "and appointed the reverend B. C. clerk, my domestic chaplain; "to have, hold, and enjoy all and singular the benefits, privi-"leges, liberties, and advantages, due and of right granted to "the chaplains of noblemen by the laws and statutes of this "realm. Given under my hand and seal, the ——— day of "——— in the year," &c. (9)

And the same being under hand and seal, it seemeth that if

(6) *Acton*'s case. (7) *Drury*'s case.

(8) Nor is the son of a bishop, or bastard of a temporal lord, qualified. *Com. Dig. Esglise.* (N. 8.)

(9) Must be both signed and sealed. *Godb.* 41. though he officiate in the family as chaplain. *Ib. Sav.* 135. *contr.*

there shall be lawful cause to discharge him, such discharge must be also under hand and seal: Which may be to this effect: "Whereas I the right honourable A. lord ——— baron of ——— [102]
"by writing under my hand and seal, bearing date the ——— "day of ——— did admit, constitute, and appoint B. C. clerk, my "domestic chaplain; to hold and enjoy all benefits, privileges, "and advantages belonging to the same: Now, by these presents, "I the said A. lord ——— do for divers good and lawful causes, "and considerations, dismiss and discharge the said B. C. from "my service as domestic chaplain, and from all privileges and "advantages to him granted as aforesaid. Given under my "hand and seal, the ——— day of ——— in the year," &c.

§ 23. And all doctors and bachelors of divinity, doctors of law, and *bachelors of law canon*, and every of them, which shall be admitted to any of the said degrees by any of the universities of this realm, *and not by grace only*, may purchase licence, and take, have, and keep two parsonages or benefices with cure of souls.

Bachelors of law canon] Dr. Ayliffe says, that no degree in the canon law hath been taken since the reformation. *Ayl. Par.* [418] (*y*).

And not by grace only] This seems to be explained by a like expression in the statute of the 14 *H.* 8. *c.* 5. intitled, "The privileges and authority of physicians in London;" by which, provision is made for the examination of physicians by the president and elects, *except he be a graduate of* Oxford *or* Cambridge, *which hath accomplished all things for his form, without any grace;* that is, (as it seemeth,) hath performed, the statutable exercises, in order to such degree, without any favour or dispensation therein. *Gibs.* 908, 909.

§ 24. Provided, that every archbishop, because he must occupy *eight chaplains at consecrations of bishops;* and every bishop, because he must occupy *six chaplains at giving of orders and consecration of churches*, may every of them have two chaplains over and above the number above limited unto them; whereof every one may purchase licence or dispensation, and take, receive, and keep as many parsonages and benefices with cure of souls, as is before assigned to such chaplains.

Dr. Ayliffe says, that notwithstanding this clause, bishops can only qualify this number for the purposes here mentioned, of ordination and consecration; but that they can qualify no more

(*y*) *Hen.* 8. in the 37th year of his reign, issued a mandate to the university of Cambridge to prohibit the taking of degrees in the canon or pontifical law. *Stat. Acad. Cant.* 137. [It is probable, says Mr. Christian, that at the same time Oxford received a similar prohibition, I. U. D. or '*juris utriusque doctor,*' *viz.* a doctor of civil and canon law is still common in foreign universities. 1 *Bla. Com.* 392, *note* 36.

than four, for a licence or dispensation, *Ayl. Par.* [418.] But this seemeth contrary to the words of the clause as above recited.

§ 25. Provided also, that no person to whom any number of chaplains or any chaplain, by any of the provisions aforesaid is limited, shall in any wise, by colour of any of the same provisions, advance any spiritual person or persons, above the number of them appointed, to receive or keep any more benefices with cure of souls, than is above limited by this act, any thing specified in the said provisions notwithstanding; and if they do, then every such spiritual person or persons, so advanced *above the said number*, to incur the penalty contained in this act.

Above the number] Altho' a chaplain retained above the number, be promoted before those who were duly retained according to the statute; such retainer (above the number) shall neither avail him, nor divest those who were duly retained of the right of purchasing dispensation; nor shall he ever have benefit by his retainer (even tho' the rest are dead) unless it be renewed upon the death of one of those who made up the statutable number: inasmuch as the retainer was null ab initio; and a chaplain once legally qualified, cannot be discharged at pleasure, to make way for others. *Gibs.* 909.

So if a baron (who can have but three chaplains) doth qualify three accordingly, and they being advanced to pluralities, he upon displeasure or for other cause doth dismiss them from their attendance, yet they are his chaplains at large, and may hold their pluralities for their lives: and tho' he may entertain as many others as he will, yet he cannot qualify any of them to hold a plurality, whilst the first three are living. (1) And so of others. But as any of the three first die; he may qualify others, if so be he retain them anew after the death of the first. *Wats. c.* 3.

If a baron, who may retain three chaplains as aforesaid, be made warden of the cinque ports (who may have a chaplain in respect of his office,) yet shall he have but three; and if a baron hath three, and be made an earl, yet he shall have but five in all; and so of the rest: because the statute is to be taken strictly against pluralities. *Gibs.* 909. (2)

§ 29. Provided, that it shall be lawful to every spiritual person, *being chaplain to the king*, to whom it shall please the king to [104] give any benefices or promotions spiritual, to what number soever it be, *to accept and take the same*, without incurring the penalty and forfeiture of this statute.

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(1) For otherwise an infinite number might be advanced in fraud of the statute, *Drury*'s case, 4 *Rep.* 90.; thus a supernumerary is not qualified for plurality without being retained *de novo* on death of another chaplain. 1 *And.* 200.

(2) *Drury*'s case, 4 *Rep.* 90.

Being chaplain to the king] It hath been resolved in the court of king's bench, that a chaplain extraordinary is not a chaplain within this statute, but only the waiting chaplains in ordinary; that is, not one who has only an entry of his name made in the book of chaplains, but one who has also a waiting time. *Gibs.* 909. (3) 1 *Salk.* 162.

To accept and take the same] Without previous dispensation; which the king himself, as supreme ordinary, hath power to grant, and his presentation of his own chaplain imports the granting of it. But if the king's chaplain be presented to a second benefice by a subject, a dispensation is necessary, and must be obtained before his institution to the second living. *Gibs.* 909. 1 *Salk.* 161. S. C.

§ 31. Provided also, that no deanery, archdeaconry, chancellorship, treasurership, chantership, or prebend in any cathedral or collegiate church, *nor parsonage that hath a vicar endowed*(4), nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice having cure of souls, in any article afore specified.

§ 32. Provided also, that every duchess, marquiss, countess, baroness, *widows*, which have taken, or that hereafter shall take any husbands under the degree of a baron may take such number of chaplains, as is above limited to them being widows, and that every such chaplain may purchase licence to have and take such number of benefices with cure of souls in manner and form as they might have done, if their said ladies and mistresses had kept themselves widows.

Being widows] And tho' they marry, the retainer before marriage stands good, and shall have its effect after marriage. If they marry under the degree of a baron, they are specially provided for in this clause, and if they marry a baron, or above that degree, my lord Coke has laid down the law in the following words: If a woman baroness retaineth two chaplains according to the statute, and afterwards taketh one of the nobility to husband; the retainer of these two chaplains remaineth, and they without new retainer may take two benefices; for their retainer

(3) *Brown* v. *Mugg*, 2 *Lord Raym.* 791. S. C.

(4) See 57 *G.* 3. *c.* 99. § 81. S. P. *infra*, tit. Residence. Where an act of parliament creates a new parish church and rectory, and directs that the bishop shall confer a certain prebend on the rector, and that the prebend shall remain united and annexed to the rectory for ever: this is not such an appropriation of the rectory to the prebend as makes it an *appropriate* benefice within the stat. 21 *H.* 8. *c.* 13. § 31., and tenable with another benefice having cure of souls. So though another act speaks of the rectory as inseparably annexed to the prebend, *Brazen-nose College* v. *Salisbury*, (Bishop) 4 *Taunt.* 831.

was not ended by the marriage. 4 *Rep.* 119. *Gibs.* 909. [but she cannot retain during coverture. *Ibid. Com. Dig.* tit. *Esglise* (N. 8.)]

Regulation of dispensations by canon.

4 Can. 41. No license or dispensation for the keeping of more benefices with cure than one, shall be granted to any, but such only as shall be thought *very well worthy for his learning*, and very well able and sufficient to discharge his duty: that is, who shall have taken the degree of a master of arts at the least in one

[105] of the universities of this realm, and be *a public and sufficient preacher licenced.* Provided always, that he be by a good and sufficient caution, *bound to make his personal residence* in each of his said benefices *for some reasonable time* in every year; and that the said benefices be *not more than thirty miles distant* asunder; and lastly, *that he have under him, in the benefice where he doth not reside, a preacher lawfully allowed,* that is able sufficiently to teach and instruct the people.

Very well worthy for his learning] So is the tenor of the Lateran council under Innocent the third against pluralities; where it is allowed, in this particular case and in no other, that the see apostolick may dispense with persons of sublime abilities and learning, that they may be honoured with more benefices than one. *Gibs.* 910.

A publick and sufficient preacher licenced] With regard to his being thus qualified (which in those days was not a common qualification), there is usually a proviso in the body of the dispensation, that in either of the churches he preach thirteen sermons every year, according to the orders of the church of England published in that behalf, and therein handle the word of God religiously and reverently. *Gibs.* 910.

Bound to make his personal residence for some reasonable time] In every dispensation to hold two benefices, there is a proviso, that in that benefice from which he shall be the more absent, he shall exercise hospitality for at least two months every year: and that proviso being evidently founded on this canon; every pluralist, who doth not observe it, is punishable by ecclesiastical censures. *Gibs.* 911.

Not more than thirty miles distant] Heretofore, it was usual to obtain licenses from the king, to take two benefices beyond the distance of thirty miles, by way of dispensation with this canon; and in such cases we find this clause in the faculties granted by the archbishop, "The king's license for distance beyond thirty miles having been first granted to you," or the like; by reason of which license and clause, they have been usually called *royal dispensations.* But none of these (as it seemeth) have been granted since the Revolution; it having been then set forth in the declaration of rights, 1 *W. Sess.* 2. *c.* 2. that the power of suspending laws or the execution of laws, by regal authority with-

out consent of parliament, is illegal; and with respect to acts of parliament in particular, it is enacted by that statute, that no dispensation by non obstante of any statute shall be allowed, unless the same shall be specially provided for in such statute. *Gibs.* 911.

Thirty miles.] *II.* 15 *G.* 3. *King* v. *Bp. of Litchfield* and *Clive.* [106]
In the common pleas: In a *quare impedit,* on the presentation to the rectory of Adderley St. Peter in the county of Salop, being a benefice of above 8*l.* value in the king's books; the declaration states, that Clive, being incumbent of Adderley, had accepted the vicarage of Clun, at more than thirty miles distance from Adderley, whereby the latter became void. Clive pleads a dispensation under the great seal, and denies that the livings are more than 30 miles distant. And upon that, issue is joined. On the trial, it was proved, by an actual admeasurement, along the turnpike road, that the distance from church to church was 48 miles, from parish to parish 43 miles; that the direct horizontal distance from church to church was 42 miles, from parish to parish 38 miles: But that by computation in the country the two livings were but 29 miles distant, and this was the usual method of computing distances upon such dispensations. Of which opinion was the judge who tried the cause and a special jury; who found a verdict for the defendant. It was moved for a new trial, alleging that the measured distance was the only one the law could take notice of: And the statute of 35 *Eliz. c.* 6. was cited, wherein a mile is declared to contain 8 furlongs, each furlong 40 poles, and each pole 16 feet and a half. On shewing cause against a new trial, it was argued, that the distance of the parishes is a matter merely regulated by the canons of the church, which may be directory in such cases to the archbishop, but is not taken notice of in the statute of dispensations, nor ever called in question in the king's temporal courts: Therefore the issue is immaterial. But if material, the ecclesiastical laws must be the rule in this case, and there the uniform practice has been to go by computed miles. And the court were clearly of opinion, that by the temporal law, the distance of the churches is immaterial; and they discharged the rule for a new trial. *Black. Rep.* 968.

N. B. In many parts of England, as also in Scotland, the computed miles most commonly run in the proportion of about two computed to three measured miles. What has been the original of the difference, seems difficult to ascertain.

[It has been remarked, that in many parts of the country the computed miles are long or short, in proportion to the difficulty or ease of travelling the road.]

That he have under him, in the benefice where he doth not reside, a preacher lawfully allowed] In pursuance of this canon (and not

of any thing in the statute), a clause to the like purpose is inserted in the faculty or dispensation. *Gibs.* 911.

And it is further provided by *Canon* 47. that whosoever hath two benefices, shall maintain a preacher licenced, in the benefice where he doth not reside; except he preach himself at both of them usually.

Manner of obtaining a dispensation.

5. The method which a presentee must pursue in order to obtain a dispensation, is as followeth:

He must obtain of the bishop in whose diocese the livings are, two certificates of the values in the king's books, and the reputed values and distance of such livings; one certificate for the archbishop, and the other for the lord chancellor. And if the livings lie in two dioceses; then two certificates, as aforesaid, are to be obtained from each bishop, each certifying the value in the king's books, and the reputed value of the living in his own diocese; and both of them the reputed distance of the two livings.

Which certificates may be in this form:

"To the most reverend father in God, Thomas, by divine providence lord archbishop of Canterbury, primate of all England, and metropolitan:

"Whereas *A. B.* clerk, master of arts, vicar of *C.* in the county of *D.* and in my diocese of *E.* is presented to the rectory of *F.* in the county and diocese aforesaid: These are therefore to certify your grace, that the said vicarage of *C.*, valued in the king's books at ———, is of the reputed yearly value of———. That the said rectory of *F.*, valued in the king's books at ———, is of the reputed yearly value of———. And that they are distant from each other about——— miles. Witness my hand the——— day of———."

The like to the lord high chancellor of Great Britain.

He must also exhibit to the archbishop his presentation to the second living.

And also bring with him two papers of testimonials from the neighbouring clergy, concerning his behaviour and conversation; one for the archbishop, and the other for the lord chancellor.

The form of which *testimonials* may be thus:

"To the most reverend father in God, Thomas, by divine providence, lord archbishop of Canterbury, primate of all England, and metropolitan:

"We whose names and seals are hereunto subscribed and set, do humbly certify your grace, that we have personally known the life and behaviour of *A. B.* clerk, master of arts, vicar of *C.* in the county of *D.* and diocese of *E.* for the space of three years
[108] now last past; that he hath, during the said time, been of good and honest life and conversation, a faithful and loyal subject to his majesty king George the third, and hath not (so far as we know) held, written, or taught any thing, but what the church of

England approves of and maintains. In witness whereof, we have hereunto set our hands and seals, this ——— day of ——— in the year of our Lord ———.

A. B. rector of A.
C. D. vicar of B.
E. F. vicar of C."

And he must in like manner exhibit to the archbishop his letters of orders of deacon and priest.

And he must also exhibit to the archbishop, a certificate of his having taken the degree of master of arts at the least, in one of the universities of this realm, under the hand of the register of such university.

And in case he be not doctor or bachelor of divinity, nor doctor of law, nor bachelor of canon law; he is to procure a qualification (according to the form above expressed) as chaplain to some nobleman, or to some other person impowered by law to grant qualifications for pluralities (which is also to be duly registered in the faculty office) in order to be tendered to the archbishop, according to the statute. And if he hath taken any of the aforesaid degrees, which the statute allows as qualifications; he is to procure a certificate thereof in the manner before-mentioned, and to exhibit the same to the archbishop. *Ecton*, 444.

After which, his dispensation is made out at the faculty office; where he gives security according to the direction of the canon. And afterwards he must repair to the lord chancellor, for confirmation under the broad seal.

All which being done, he is then to apply himself to the bishop of the diocese where the living lies, for his admission and institution. *Deg. p.* 1. *c.* 4.

6. In pursuance of the statute and canons aforegoing, the *form of a dispensation* is usually as followeth: **Form of a dispensation.**

" Thomas, by divine providence archbishop of Canterbury,
" primate of all England, and metropolitan, by authority of par-
" liament lawfully impowered for the purpose herein written: To
" our beloved in Christ A. B. clerk, master of arts, of ———
" college in the university of ——— and also chaplain to the
" right honourable C. lord ——— health and grace. The greater
" progress men make in sacred learning, the greater encourage-
" ment they merit; and the more their necessities are in daily [109]
" life, the more necessary supports of life they require. Upon
" which considerations, and being moved by your supplications
" in this behalf, We do (by virtue and in pursuance of the power
" vested in us by the statutes of this realm) by these presents
" graciously dispense with you; that, together with the rectory
" of the parish church of ——— in the county of ——— and
" diocese of ——— which you now possess, the annual fruits

" whereof, according to the valuation made in the books of first
" fruits and tenths of ecclesiastical benefices remaining in the ex-
" chequer of our sovereign lord the king, do not exceed the sum
" of ——— you may freely and lawfully accept, and hold as
" long as you shall live, the rectory of the parish church of
" ——— in the county of ——— and diocese of ——— not
" distant from the former above ——— miles or thereabouts,
" the annual fruits whereof according to the valuation aforesaid,
" do not exceed the sum of ———. Provided always that in each
" of the churches aforesaid, as well in that, from which it shall
" happen that you shall be for the greater part absent, as in the
" other, on which you shall make perpetual and personal re-
" sidence, you do preach thirteen sermons every year according
" to the ordinances of the church of England promulged in that
" behalf; and do therein sincerely, religiously, and reverently
" handle the holy word of God; and that in the benefice, from
" which you shall happen to be most absent, you do nevertheless
" exercise hospitality, two months yearly; and for that time, ac-
" cording to the fruits and profits thereof, as much as in you
" lieth, you do support and relieve the inhabitants of that parish,
" especially the poor and needy. Provided also, that the cure
" of the souls of that church from which you shall be most ab-
" sent, be in the mean time in all respects laudably served by an
" able minister, capable to explain and interpret the principles of
" the Christian religion, and to declare the word of God unto
" the people, in case the revenues of the said church can con-
" veniently maintain such minister; and that a competent and
" sufficient salary be well and truly allowed and paid to the said
" minister, to be limited and allotted by the proper ordinary at
" his discretion, or by us or our successors, in case the diocesan
" bishop shall not take due care therein. Provided nevertheless,
" that these presents do not avail you any thing, unless duly
[110] " confirmed by the king's letters patent. Given under the seal
" of our office of faculties, this ——— day of," &c.

The lord chancellor's confirmation.

" George the Fourth, &c. To all to whom these our present
" letters shall come, greeting: We have seen certain letters of
" dispensation to these presents annexed; which, and every
" thing therein contained, according to a certain act in that be-
" half made in the parliament of Henry the Eighth heretofore
" king of England, our predecessor, we have ratified, approved,
" and confirmed, and for us, our heirs and successors we do
" ratify, approve, and confirm by these presents: So that the
" reverend A. B. clerk, master of arts, in the letters aforesaid
" named, may use, have, and enjoy, freely and quietly, with im-
" punity, and lawfully, all and singular the things in the same

"specified, according to the force, form, and effect of the same,
"without any impediment whatsoever, although express mention
"of the certainty of the premises, or of any other gifts or grants
"by us heretofore made to the said A. B. be not made in these
"presents; or any other thing, cause, or matter whatsoever in
"any wise notwithstanding. In testimony whereof we have
"caused these our letters to be made patent. Witness ourself
"at Westminster the ——— day of ——— in the ——— year
"of our reign."

7. By 55 *G*.3. *c*.184. Sched. Part I. tit. **Dispensation**, to hold two ecclesiastical dignities or benefices, or a dignity and a benefice, a stamp duty is imposed of 40*l*. where either of them shall be above the yearly value of ten pounds in the king's books, and in all other cases, 25*l*. **Stamp duty on dispensations to hold two livings.**

8. By the 13 *El*. *c*.20. all chargings of benefices with cure, and not impropriated with any pension, or with any profit out of the same to be yielded or taken, other than rents reserved upon leases, shall be void. § 1. (5) **Leases of pluralists.** [111]

9. By the 1 *W*. *c*.26. If the universities shall present or nominate to any popish benefice with cure, prebend, or other ecclesiastical living, any person who shall then have any other benefice with cure of souls; such presentation shall be void. **Popish livings.**

Polygamy.

See **Bigamy.**

BY Stat. 1. *Ja*. *c*.11. *If any person within his majesty's dominions of England and Wales, being married, shall marry any person, the former husband or wife being alive; every such offence shall be felony, and the person so offending shall suffer death as in cases of felony; and shall be tried in the county where he or she was apprehended,* as if the offence had been committed in such county.

Provided that this *shall not extend to any person, whose husband or wife shall be continually remaining beyond the seas for seven years together:*

Or whose husband or wife shall absent him or her self the one from the other, for seven years together, in any part within his majesty's dominions, the one of them not knowing the other to be living within that time.

Provided also, that this *shall not extend to any person that*

(5) This act is repealed as to leases by 57 *G*.3. *c*.99. § 1. See **Leases**, *notes*.

shall be at the time of such marriage divorced by any sentence in the ecclesiastical court:

Or, to any person where the former marriage hath been by sentence in the ecclesiastical court declared to be void and of no effect:

Nor to any person by reason of any former marriage had or made within age of consent.

Provided also, that no attainder for this offence made felony by this act, shall work any corruption of blood, loss of dower, or disinherison of heirs.

If any person within his majesty's dominions of England and Wales] If the first marriage was beyond sea, and the latter in
[112] England, the party may be indicted here, because the latter marriage makes the offence; but if the first marriage was in England, and the latter beyond sea, it seemeth that the offender cannot be indicted here, because the offence was not within the kingdom. *Kely.* 79, 80. (6)

Being married] This extendeth to a marriage *de facto*, or voidable by reason of consanguinity, affinity, or such like; for it is a marriage in judgment of law until it be avoided; and therefore though neither marriage be *de jure*, yet they are within this statute. 3 *Inst.* 88.

Shall marry any person, the former husband or wife being alive] If a man marrieth a wife, and then marrieth another, the former wife being living, and then such first wife dying he marrieth a third, the second wife being living; this marrying of the third is not felony, because the marriage with such second wife was merely void: but otherwise it would have been if he had married the third, the first and true wife being living. 1 *H. H.* 693.

Every such offence shall be felony] And such second marriage is merely void. 3 *Inst.* 88.

And the person so offending shall suffer death as in cases of felony] Yet he shall have the benefit of clergy; the same being not excluded by express words. 2 *Inst.* 89.

And shall be tried] The first and true wife is not to be allowed as a witness against the husband; but it seemeth clear, that the second wife may be admitted to prove the second marriage, being not so much as his wife *de facto*. 1 *H. H.* 693.

In the county where he or she was apprehended] This is added

(6) And such felony is not, by the common law triable here in England, *Kelynge's Rep.* 79. cited by Sir *Edw. Simpson* in *Scrimshire* v. *Scrimshire*, 29 July 1752, reported 2 *Hagg. Rep.* 416, 1 *Sid. Rep.* 171. S. C. Thus the acts 11 & 12 *W.* 3. *c.* 12. and 42 *G.* 3. *c.* 85. were passed to try and punish in Great Britain persons holding public employments, for offences committed abroad: and see *Tyr. & Tyn. Digest of the Statutes*, tits. *East India Company, Oaths, Piracy, &c. &c.*

only *cumulative;* for he may be indicted where the second marriage was, though he be never apprehended; and so be proceeded against to outlawry. 1 *H.H.* 694.

Shall not extend to any person whose husband or wife shall be continually remaining beyond the seas for seven years together] And in this case notice that he or she is living, is not material, in respect of the commorancy beyond sea. 3 *Inst.* 88.

Beyond the seas] And this, although it be within the king's dominions; as in New England or Ireland. 1 *H.H.* 693.

Or whose husband or wife shall absent him or herself the one from the other, for seven years together, in any part within his majesty's dominions, the one of them not knowing the other to be living within that time] So that in this case notice is material, and maketh the offence. 3 *Inst.* 88.

Shall not extend to any person that shall be at the time of such marriage divorced by any sentence in the ecclesiastical court] And this is intended a divorce not a *a vinculo matrimonii,* for then without the aid of any proviso either may freely marry; but it must be intended of divorces *a mensa et thoro.* 1 *H.H.* 694. [113]

Nor to any person by reason of any former marriage had or made within the age of consent] If the man be above fourteen and the wife under twelve, or if the wife be above twelve and the man under fourteen, yet may the husband or wife so above the age of consent disagree to the espousals, as well as the party that is under the age of consent; for the advantage of disagreement must be reciprocal. And so it was resolved by the judges and civilians, *T.* 42 *El.* in the king's bench, in a writ of error between *Babington* and *Warner.* So as if either party be within age of consent, it is no former marriage within this act. 3 *Inst.* 89.

H. 4 *G. Strutville*'s case. By *Parker* chief justice: Where a woman marries a second husband, the first husband being alive, and the second not privy; as to what she acquired during the cohabitation, she shall be esteemed as a servant to the second husband, who is entitled to the benefit of her labour.

[This act having proved ineffectual to restrain such offences, the 35 *G.* 3. *c.* 67. subjects persons who marry, the former husband or wife being alive, to the penalties inflicted on those who are convicted of grand or petit larceny. They may now therefore be transported for the term of seven years, or, if males, confined to hard labour on board the hulks [see 56 *G.* 3. *c.* 27. § 9. 53 *G.* 3. *c.* 162.]; and if they return before the expiration of the term for which they are sentenced, are to suffer death, and may be tried either in the county where they were convicted, or in that in which they are apprehended.]

Popery.

See *Digest of the Statutes, and Index thereto,* tit. PAPIST.

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XXVII. *Popish schoolmasters.*
XXVIII. *Papists shall not succeed to the crown of this realm.*
XXIX. *Papists shall not sit in either house of parliament.*

XXX. *Papists [recusants convict] shall not present to benefices.*
XXXI. —— *shall be as excommunicated.*
XXXII. —— *shall not repair to court.*
XXXIII. —— *shall not come within ten miles of London.*
XXXIV. —— *shall not remove above five miles from their habitation.*
XXXV. —— *shall be disabled as to law, physick, and offices.*
XXXVI. (A) —— *shall not be executors, administrators, or guardians.*
XXXVI. (B) —— *to enjoy lands, must take and subscribe the oath prescribed by* 18 *G.* 3. *c.* 60. [115]
XXXVII. *Inrolling deeds and wills of papists.*
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XLIV. *Papists conforming.*
XLV. *Saving of the ecclesiastical jurisdiction.*
[XLVI. *Summary of the* 31 *G.* 3. *c.* 32.]

I. *Papal incroachments in this realm.*

1. THERE doth not appear much of the pope's power in this realm before the conquest. But the pope having favoured and supported king William the first in his invasion of this kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to send his legates hither; and prevailed with Henry the first to give up the donation of bishopricks; and in the time of king Stephen gained the prerogative

of appeals; and in the time of Henry the second exempted all clerks from the secular power. 1 *Haw.* 49, 50.

2. And not long after this, by a general excommunication of the king and people for several years, because they would not suffer an archbishop to be imposed upon them; king John was reduced to such straits, that he was obliged to surrender his kingdoms to the pope, and to receive them again, to hold of him for the rent of a thousand marks. 1 *Haw.* 50.

3. And in the following reign of Henry the third; partly from the profits of our best church benefices, which were generally given to Italians and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out of the kingdom 70,000*l.*, an immense sum in those days. 1 *Haw.* 50.

4. The nation, being under this necessity, was obliged to provide for the prerogative of the prince and the liberties of the people, by many strict laws; as will appear in the following sections. 1 *Haw.* 50.

[116] [The rigour of these laws has been much softened by the 31 *G.*3. *c.*32. in favour of such papists as shall qualify themselves in the manner prescribed by that act; but such as shall refuse or neglect to take and subscribe the oath and declaration therein mentioned, (for which vid. *infra*, XLVI. and Oaths, 20. B.) still remain liable to the penalties and inconveniences hereafter stated; some of which attach upon *popish recusants* and some upon *popish recusants convict.*]

II. *Popish jurisdiction abolished.*

1. *Art.* 37. The bishop of Rome hath no jurisdiction in this realm of England.

2 *Can.* 1. All ecclesiastical persons shall faithfully keep and observe, and (as much as in them lieth) shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom the ancient jurisdiction over the state ecclesiastical, and abolishing all foreign power repugnant to the same. And all ecclesiastical persons having cure of souls, and all other preachers and readers of divinity lectures, shall to the utmost of their wit, knowledge, and learning, purely and sincerely, without any colour of dissimulation, teach, manifest, open and declare, four times a year at least, in their sermons and other collations and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of God) is for most just causes taken away and abolished; and that, therefore, no manner of obedience or subjection is due unto any such foreign power.

3. By the 26 *H.* 8. *c.* 1. The king shall be taken as the only supreme head in earth of the church of England, and shall have and enjoy annexed to the imperial crown of this realm, all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of supreme head of the same church belonging; and shall have power, from time to time, to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities, which by any spiritual authority may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended; any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary notwithstanding.

4. And by the 35 *H.* 8. *c.* 3. Whereas the king hath heretofore [117] been, and is justly, lawfully, and notoriously known, named, published, and declared to be king of England, France, and Ireland, defender of the faith, and of the church of England, and also of Ireland, in earth supreme head, and hath justly and lawfully used the title and name thereof; it is enacted, that all his majesty's subjects shall from henceforth accept and take the same his majesty's style, as it is declared and set forth in manner and form following; *viz. Henry the eighth, by the grace of God, king of England, France, and Ireland, defender of the faith, and of the church of England, and also of Ireland, in earth the supreme head:* and the said style shall be for ever united and annexed to the imperial crown of this realm.

5. And by the 1 *Eliz. c.* 1. To the intent that all the usurped and foreign power and authority, spiritual and temporal, may for ever be clearly extinguished, and never to be used or obeyed within this realm; it is enacted, that no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall at any time use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm; but the same shall be clearly abolished for ever: any statute, ordinance, custom, constitutions, or any matter or cause whatsoever to the contrary notwithstanding. § 16.

And such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath been heretofore or may lawfully be exercised or used, for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever be united and annexed to the imperial crown of this realm. § 17.

And for the utter extinguishment of all foreign and usurped power and authority, it is enacted; that if any person shall by

writing, printing, teaching, preaching, express words, deed or act, advisedly, maliciously and directly affirm, hold, stand with, set forth, maintain or defend the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate whatsoever, heretofore claimed, used, or usurped within this realm; or shall advisedly, maliciously, and directly put in use or execute any thing, for the extolling, advancement, setting forth, maintenance or defence of any such
[118] pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof; he, his abettors, aiders, procurers, and counsellors, being thereof attainted according to the true order and course of the common laws of this realm, shall for the first offence forfeit to the king all his goods and chattels, as well real as personal; and if he have not goods worth 20*l.* he shall also be imprisoned for a year; and also all the ecclesiastical promotions of every spiritual person so offending shall be void: for the second offence shall incur a præmunire: and for the third offence shall be guilty of high treason. But no person shall be molested for any offence by preaching, teaching, or words, unless he be indicted within one half year. And no person shall be indicted or arraigned for any offence adjudged by this act, unless there be two sufficient witnesses or more, to testify the offence; and the said witnesses, or so many of them as shall be living, and within the realm at the time of the arraignment, shall be brought forth in person, face to face to give evidence, if the party require it. And if any person shall happen to give relief, aid, or comfort, to a person offending in any such case of præmunire or treason; this shall not be taken to be an offence, unless there be two sufficient witnesses openly to testify, that the person had notice and knowledge of the offence committed. § 27, 28, 29, 30, 31. 37, 38. And by the 23 *El. c.* 1. § 8. The justices of the peace may inquire of offences within this act (*but not hear and determine the same*), within a year and a day after the offence committed.

6. And by the 5 *El. c.* 1. (which act is required to be read at every quarter sessions, leet and law day, and once in every term in the open hall of every house of court and chancery,) if any person shall by writing, printing, preaching, or teaching, deed or act, advisedly and wittingly hold or stand with, to extol, set forth, maintain, or defend the authority, jurisdiction, or power of the bishop of Rome or of his see, heretofore claimed, used, or usurped within this realm; or by any speech, open deed, or act, advisedly and wittingly attribute any such manner of jurisdiction, authority, or pre-eminence to the said bishop or see of Rome within this realm: he, his abettors, procurers, and counsellors, and also their aiders, assistants, and comforters, upon purpose and to the intent to set forth further and extol the said usurped power, being thereof lawfully indicted or presented within one year, and con-

victed or attainted at any time after, shall incur a præmunire: And as well justices of assize in their circuits, as justices of the peace in their quarter or open sessions, may inquire thereof as of other offences against the peace, and shall certify every presentment thereof into the king's bench within forty days, if the term be then open; if not, at the first day of the full term next following the said forty days; on pain of 100*l.*: and the justices of the king's bench shall hear and determine the same, as in other cases of præmunire. And for the second offence, such person shall be guilty of high treason: But not to work corruption of blood, disherison of heirs, or forfeiture of dower. Provided that the charitable giving of reasonable alms to any offender, without fraud or covin, shall not be deemed any such abetment, procuring, counselling, aiding, assisting, or comforting, as thereby to incur any pain or forfeiture.

His abettors, procurers, and counsellors, and also their aiders, assistants, and comforters.] An indictment against any such person must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope; and to say, *against the form of the statute* only, is not sufficient. 1 *H.H.* 332.

Charitable giving of reasonable alms.] This special clause of giving alms not to make an aider or comforter, if the alms be reasonable and without covin, though the offender be not imprisoned nor under bail, seems to be but agreeable to the common law; and therefore it seems, even by the common law, if a physician or surgeon minister help to an offender sick or wounded, though he know him to be an offender even in treason, this makes him not a traitor, for it is done upon the account of common humanity; but it will be misprision of treason, if he know it, and do not discover him. 1 *H.H.* 332.

7. Finally, by the 3 *Ja. c.* 4. If any person shall, either upon the seas, or beyond the seas, or in any other place within the king's dominions, put in practice to absolve, persuade, or withdraw any of his majesty's subjects from their natural obedience, or to reconcile them to the pope or see of Rome, or to any other prince, state, or potentate; or shall be willingly so absolved or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority, prince, state, or potentate; he, his procurers and counsellors, aiders and maintainers, knowing the same, shall be guilty of high treason. § 22, 23.

But this shall not extend to any person who shall be reconciled to the pope or see of Rome (for and touching the point of so being reconciled only) that shall return into this realm, and [120] thereupon within six days before the bishop of the diocese or two justices of the peace of the county where he shall arrive, submit himself and take the oaths (of allegiance and supremacy, 1 *W.*

sess. 1. *c.* 8.): which oaths the said bishop or justices shall certify at the next sessions, on pain of 40*l.* § 24.

And persons shall be tried for these offences, at the assizes of that county, or in the king's bench, and be there proceeded against as if the treason had been committed in the county where the person shall be taken. § 25.

III. *Peter-pence abolished.*

Peter-pence was an annual tribute of one penny, paid at Rome out of every family at the feast of St. Peter. *Gibs.* 87.

And this, Ina the Saxon king, when he went in pilgrimage to Rome about the year 740, gave to the pope, partly as alms, and partly in recompense of a house erected in Rome for English pilgrims. *God.* 111. 356.

And this continued to be paid generally until the time of king Henry the eighth, when it was enacted, that from thenceforth no person shall pay any pensions, censes, portions, peter-pence, or any other impositions, to the use of the bishop or see of Rome. 25 *H.* 8. *c.* 21.

IV. *First fruits and tenths taken from the pope.*

First fruits, annates, or primitiæ, are the first fruits after the avoidance of every spiritual living for one whole year. These have been paid of very ancient time; for amongst the laws of king Ina, who began his reign in the year 712, there is an order for the payment thereof. But the pope did not obtain to have them appropriated to himself, until after the reign of king Edward the first. 4 *Inst.* 120. *God.* Introd. 49. *Degge* P. 2. c. 15.

Tenths, decimæ, are the tenth part of the yearly value of all ecclesiastical livings. This payment was exacted from the clergy by the pope in the reign of king Edward the first; and was sometimes granted by the pope to the kings of this realm, especially for the aid of the Holy Land: but afterwards these tenths became wholly appropriated to the see of Rome. 4 *Inst.* 120, 121.

[121] But by the 26 *H.* 8. *c.* 3. (z) The revenues of the first fruits and tenths are for ever annexed to the imperial crown of this realm. (See **First Fruits and Tenths.**)

V. *The pope's presentation to benefices.*

1. By the 25 *Ed.* 3. *st.* 6. If any reservation, collation, or provision be made by the court of Rome, of any archbishoprick, bishoprick, dignity, or other benefice, in disturbance of the right-

(z) And also by 1 *El.* *c.* 4.

ful donors; the king shall present for that time, if such donors shall not themselves exercise their right. And if persons lawfully presented shall be disturbed by such provisors; then the said provisors, their procurators, executors, and notaries, shall be attached by their body, and brought in to answer, and if they be convict, they shall abide in prison without bail, till they have made fine to the king and gree to the party grieved; and before they be delivered, they shall make full renunciation, and find surety that they shall not attempt such things in time to come. And if they cannot be found, the exigent shall go against them.

2. By the 38 *Ed.* 3. *st.* 2. To cease the perils that shall happen, because of provisions of benefices; it is ordained, that all persons obtaining such provisions, shall be punished according to the aforesaid statute of the 25 *Ed.* 3., and they who cannot be attached, if they appear not in two months, shall be punished according to the statute of provisors of the 27 *Ed.* 3. *c.* 1. (*hereafter following.*)

3. By the 12 *R.* 2. *c.* 15. No person shall pass or send out of the realm, without the king's licence, to provide for himself a benefice; on pain that such proviso shall be out of the king's protection, and the benefice to be void.

4. And by the 13 *R.* 2. *st.* 2. *c.* 2. If any shall accept a benefice contrary to the statute of the 25 *Ed.* 3. *st.* 6. he shall be banished out of the realm for ever, and his lands and goods forfeited to the king.

5. By the 3 *R.* 2. *c.* 3. No person shall take to ferm any benefice of an alien, without the king's licence: nor shall convey money out of the realm for such ferm, on pain of being punished as by the statute of provisors of the 27 *Ed.* 3.

6. And by the 7 *R.* 2. *c.* 12. If any alien shall purchase and occupy any benefice without the king's licence, he shall be comprised within the statute of the 3 *R.* 2. *c.* 3. and moreover shall [122]
incur the forfeitures of the 25 *Ed.* 3. *st.* 5. *c.* 22. (*that he shall be out of the king's protection.*)

7. And finally, by the 16 *R.* 2. *c.* 5. which is the famous statute called *the statute of præmunire;* if any shall purchase or pursue, in the court of Rome or elsewhere, any translation of any prelate out of the realm, or from one bishoprick to another,— he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body, if he may be found, and brought before the king and his council, there to answer, or else process to be made against him by præmunire facias, as in other statutes of provisors.

Shall be put out of the king's protection.] By these words, the persons attainted in a writ of præmunire are disabled to have any action or remedy by the king's law or the king's writs; for the law and the king's writs are the things whereby a man is

protected and aided; so as he who is out of the king's protection is out of the aid and protection of the law. 3 *Inst.* 126.

VI. *Appeals to Rome.*

1. The statutes concerning the prohibition of appeals to Rome, are but declaratory of the ancient law of the realm. 4 *Inst.* 340, 341.

2. The first attempt of any appeal to the see of Rome out of England was by Anselm, archbishop of Canterbury, in the reign of William Rufus: and yet it took no effect. 4 *Inst.* 341.

And the same is opposed by the statutes following:

3. By the 27 *Ed.* 3. *c.* 1. called the statute of provisors, All the people of the king's ligeance, which shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue in any other court, to defeat or impeach the judgments given in the king's court, shall have a day containing the space of two months by warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's justices of the one bench or the other, to answer to the king for the contempt. And if they come not at the day to be at the law, they, their procurators, attornies, executors, notaries and maintainers, shall be put out of the king's protection, and their lands and goods forfeit to the king, and their bodies
[123] (wheresoever they may be found) shall be taken and imprisoned and ransomed at the king's will: And upon the same a writ shall be made to take them by their bodies, and to seize their lands and goods into the king's hands; and if it be returned that they be not found, they shall be put in exigent and outlawed.

4. By the 38 *Ed.* 3. *st.* 2. To cease the perils that shall happen, because of citations out of the court of Rome, upon causes whose cognizance pertaineth to the king's court, it is ordained, that all persons obtaining such citations shall be punished according to the statute of the 25 *Ed.* 3. *st.* 6. (*above recited*); and they who cannot be attached, if they appear not in two months, shall be punished according to the aforesaid statute of provisors. And the king, clergy, and laity do mutually engage to stand by one another in defence of this act.

5. By the 13 *R.* 2. *st.* 2. *c.* 3. If any person shall bring or send into the realm any summons, sentences, or excommunications against any person for executing the statute of provisors, he shall be imprisoned, and forfeit his lands and goods, and incur the pain of life and member: And if any prelate make execution thereof, his temporalties shall be taken into the king's hands; and if any person of less estate than a prelate make such execu-

tion, he shall be imprisoned, and make fine and ransom by the discretion of the king's council.

6. By the statute of præmunire, 16 *R.* 2. *c.* 5. If any shall purchase or pursue, in the court of Rome or elsewhere, any processes, sentences of excommunication, bulls or instruments, against any persons executing judgments in the king's courts, or shall bring within the realm or receive the same, he shall be put out of the king's protection, his lands and goods forfeit to the king, and shall be attached by his body if he may be found, and brought before the king and his council there to answer, or else process to be made against him by præmunire facias, as in other statutes of provisors.

Or elsewhere.] It hath been said, that suits in the ecclesiastical courts within this realm are within these words, if they concern matters, the cognizance whereof belongs to the common law; as where a bishop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks. 1 *Haw.* 51.

But it seemeth that a suit in those courts, for a matter which appears not by the libel itself, but only by the defendant's plea or other matter subsequent, to be of temporal cognizance (as where [124] a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they became a lay fee), is not within the statute; because it appears not that either the plaintiff or the judge knew that they were severed. 1 *Haw.* 52.

7. Finally, by the 24 *H.* 8. *c.* 12. All causes testamentary, causes of matrimony, and divorces, rights of tithes, oblations, and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and custom of the same, appertaineth to the spiritual jurisdiction of this realm) shall be determined within the king's jurisdiction and authority, and not elsewhere; any foreign inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, judgments, or other process, or impediments whatsoever notwithstanding. And all spiritual persons shall and may use, minister, and execute all divine services, any foreign citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals touching any the causes aforesaid, from or to the see of Rome, or any other foreign prince or court, to the contrary notwithstanding: And if they shall, by the occasion thereof, refuse to minister the same, they shall be imprisoned for a year, and make fine and ransom at the king's pleasure.

And if any person in any of the causes aforesaid, shall attempt to procure from the see of Rome or elsewhere, any foreign process or other the instruments abovementioned, or execute any of the same, or do any thing to the hindrance of any process, sentence, judgment, or determination in any courts of this realm,

for any the causes aforesaid; he, his fautors, comforters, abettors, procurers, executors, and counsellors, shall incur a præmunire.

VII. *Bringing bulls and other instruments from Rome.*

1. By the 25 *H.*8. *c.*21. If any person shall sue to the court or see of Rome for any licence, faculty, or dispensation, or put any of the same in execution; he shall incur a præmunire.

2. And by the 28 *H.*8. *c.*16. All bulls, breves, faculties, and dispensations heretofore obtained of the see of Rome, shall be void; and shall not be pleaded in any court of this realm, on pain of præmunire.

Yet it hath been holden, that the alleging of an ancient bull [125] in order to induce another principal matter, whereon to ground a title, without claiming any thing from the bull itself, is not within this statute. 1 *Haw.* 51.

3. By the 13 *Eliz. c.*2. If any person shall use or put in ure any bull, writing, or instrument, written or printed, of absolution or reconciliation obtained from the bishop of Rome or other person claiming authority by or from him; or shall take upon him by colour thereof to absolve or reconcile any person, or to grant or promise to any person any such absolution or reconciliation, by any speech, preaching, teaching, writing, or any other open deed; or shall willingly receive and take any such absolution or reconciliation; or shall obtain from the bishop of Rome any manner of bull, writing, or instrument, written or printed, containing any thing, matter, or cause whatsoever; or shall publish or by any means put in ure any such bull, writing, or instrument; he, his procurers, abettors and counsellors to the fact and committing of the said offence, being attainted according to the course of the laws of this realm, shall be adjudged guilty of high treason. And all aiders, comforters, or maintainers of any the said offenders, after committing any the said offences, to the intent to set forth, uphold, or allow the execution of the said usurped power, shall incur a præmunire.

And if any person, to whom any such absolution, reconciliation, bull, writing or instrument, shall be offered, moved or persuaded to be used, put in ure or executed, shall conceal the same offer, motion, or persuasion, and not disclose the same by writing or otherwise within six weeks to some of the privy council; he shall be guilty of misprision of high treason.

And the justice of the peace may inquire thereof (*but not hear and determine the same*) within a year and a day after the offence committed. 23 *El. c.*1. § 8.

And if any justice of the peace to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council; he shall incur a præmunire.

VIII. *Popish books and relicks.*

1. By the 3 & 4 *Ed.* 6. *c.* 10. All books called antiphoners, missals, grails, processionals, manuals, legends, pies, portuasses, primers in Latin and English, couchers, journals, ordinals, or other books or writings heretofore used for the service of the church, written or printed in the English or Latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished and forbidden for [126] ever to be used or kept in this realm.

And if any person or body corporate that shall have in his or their custody any of the said books or writings, or any images of stone, timber, alabaster or earth, graven, carved or painted, which have been taken out of or stand in any church or chapel, and do not destroy the same images and every of them, and deliver every of the same books to the mayor, bailiff, constable or churchwardens of the town where such books shall be, to be by them delivered over openly within three months next following after such delivery, to the archbishop, bishop, chancellor or commissary of the diocese, to the intent that they may cause them immediately after either to be openly burnt, or otherwise defaced and destroyed: (*he, or they,*) shall for every such book or books willingly retained forfeit to the king for the first offence twenty shillings, for the second four pounds, and for the third shall suffer imprisonment at the king's will.

And if any mayors, bailiffs, constables or churchwardens, do not within three months after receipt of the same books deliver them to the archbishop, bishop, chancellor or commissary; and if such archbishop, bishop, chancellor or commissary, do not within forty days after receipt of such books, burn, deface and destroy the same: every of them so offending shall forfeit to the king 40*l.* The one half of all which forfeitures shall be to any of the subjects that will sue for the same.

And the justices of assize in their circuits, and justices of the peace in their general sessions, may inquire of, hear, and determine the same.

But nothing herein shall extend to any image or picture, set or graven upon any tomb, in any church, chapel, or church-yard, only for a monument of any king, prince, nobleman, or other dead person, which hath not been commonly reputed and taken for a saint.

Also, any person may use, keep, and have any primers in the English or Latin tongue, set forth by King Hen. 8. so that the sentences of invocation or prayer to saints be blotted or put out of the same.

2. By the 13 *Eliz. c.* 2. If any person shall bring into the realm any token or thing called by the name of Agnus Dei, or any crosses, pictures, beads, or such like vain and superstitious things

from the bishop or see of Rome, or from any person, authorized or claiming authority from the said bishop of Rome to consecrate or hallow the same; and shall deliver, or cause or offer to be
[127] delivered the same or any of them to any subject of this realm, to be worn or used; he, and also every other person who shall receive the same to the intent to use and wear the same, shall incur a præmunire.

Provided, that if any person to whom any such Agnus Dei or other the things aforesaid shall be offered to be delivered, shall apprehend the party offering the same, and bring him to the next justice of the peace, if he shall be able so to do; or, for lack of such ability, shall within three days disclose the name of such person so offering the same and his dwelling place or place of resort (which he shall endeavour himself to know by all the means he can) to the ordinary of the diocese, or to a justice of the peace of the shire where such person to whom such offer shall be made shall be resiant; and also if such person to whom such offer shall be made shall happen to receive any such Agnus Dei or other thing above remembered, and shall in one day next after such receipt deliver the same to a justice of the peace: in such case he shall not incur any danger or penalty.

And if any justice of the peace, to whom any the said offences shall be declared, do not within fourteen days signify the same to one of the privy council, he shall incur a præmunire.

3. By the *3 J. c. 5.* No person shall bring from beyond the seas, nor shall print, sell, or buy any popish primers, ladies' psalters, manuals, rosaries, popish catechisms, missals, breviaries, portals, legends, and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books, printed or written in the English tongue, on pain of 40*s.* for every book, one third to the king, one third to him that shall sue, and one third to the poor of the parish where such books shall be found, and the said books to be burned. § 25.

And two justices of the peace (and mayors within cities and towns corporate) may search the houses and lodgings of every popish recusant convict, or of every person whose wife is a popish recusant convict, for popish books and relicks of popery; and if any altar, pix, beads, pictures, or such like popish relicks, or any popish book or books, shall be found in any of their custody, as in the opinion of the said justices (or mayor) shall be thought unmeet for such recusant to have or use, the same shall presently be defaced and burnt, if it be meet to be burned; and
[128] if it be a crucifix, or other relic of any price, the same to be defaced at the general quarter sessions of the peace in the county where the same shall be found, and the same so defaced to be restored to the owner. § 26.

[But the 31 *G. 3. c.* 32. allows Catholicks, who shall take and subscribe the oath and declaration therein contained (for which

see Oaths, 20 B.), to perform the rites and ceremonies of their religion, under the regulations thereby prescribed. Vid. *infra*, XLVI.]

Note; a *recusant* in general, signifieth any person, whether papist or other, who refuseth to go to church and to worship God after the manner of the church of England; a *popish recusant*, is a papist who so refuseth; and a *popish recusant convict*, is a papist legally convicted of such offence.

IX. *Jesuits and popish priests.*

1. By the 27 *El. c.* 2. All jesuits, seminary priests, and other priests whatsoever made or ordained out of the realm, or within the realm, by any authority derived or pretended from the see of Rome, shall depart out of the realm. § 2.

And it shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever, being born within the realm, and made, ordained, or possessed by any authority derived or pretended from the see of Rome, by what name, title, or degree soever the same shall be called or known, to come into, be or remain in any part of the realm; and if he do, he shall be guilty of high treason. § 3.

And every person who shall wittingly and willingly receive, relieve, comfort, aid, or maintain any such jesuit, seminary priest, or other priest, deacon, or religious or ecclesiastical person as aforesaid, shall be guilty of felony without benefit of clergy. § 4.

And if any subject (not being a jesuit, seminary priest, or other such priest, deacon or religious or ecclesiastical person as is before mentioned) who shall be of or brought up in any college of jesuits or seminary out of this realm in any foreign parts, shall not in six months next after proclamation in that behalf to be made in the city of London under the great seal of England, return into this realm, and thereupon (within two days next after such return) before the bishop of the diocese or two justices of the peace of the county where he shall arrive, submit himself and take the oath of supremacy; every such person who shall [129] otherwise return into or be in this realm without submission as aforesaid, shall be guilty of high treason. § 5.

And if any person shall wittingly and willingly, either directly or indirectly, convey, deliver or send, or procure to be conveyed or delivered to be sent out of this realm into any foreign parts; or shall otherwise wittingly or willingly give or contribute any money or other relief to or for any jesuit, seminary priest, or such other priest, deacon, or religious or ecclesiastical person as is aforesaid, or to or for the maintenance or relief of any college of jesuits, or seminary out of the realm in any foreign parts, or of any person then being of or in the same colleges or seminaries,

and not returned with submission, as in this act is expressed; he shall incur a præmunire. § 6.

And every offence against this act may be inquired of, heard and determined, as well in the court of king's bench in the county where the same court shall for the time be, as also in any other county within this realm where the offence shall be committed, or where the offender shall be taken. § 8.

But nothing herein shall extend to any such jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person as is before mentioned, as shall within three days after he come into the realm, submit himself to some archbishop or bishop of this realm, or to some justice of the peace within the county where he shall arrive or land, and do thereupon truly and sincerely, before such archbishop, bishop, or justice of the peace, take the oath of supremacy, and by writing under his hand confess and acknowledge, and from thenceforth continue his due obedience to the laws and statutes of this realm in causes of religion. § 10.

And every person who shall know and understand that any such jesuit, seminary priest, or other priest abovesaid, shall be within this realm, and shall not discover the same to a justice of the peace, or other higher officer, in twelve days, but willingly conceal his knowledge therein, shall be fined and imprisoned at the king's pleasure. And if such justice of the peace, or other such officer to whom such matter shall be so discovered, do not within twenty-eight days give information thereof to some of the privy council, he shall forfeit 200 marks. § 13.

And such of the privy council to whom such information shall be made, shall thereupon deliver a note in writing, subscribed [130] with his hand, testifying that such information was made to him. § 14.

And all such oaths and submissions as shall be made by force of this act, shall be certified into the chancery by the parties before whom the same shall be made within three months after such submission, on pain of 100*l.* to the queen. § 15.

And if any person so submitting himself shall within ten years after such submission made, come within ten miles of the place where the queen shall be, without special licence under her majesty's hand, he shall take no benefit by his submission, but the same shall be void. § 16.

2. By the 35 *El. c.* 2. If any person who shall be suspected to be a jesuit, seminary, or massing priest, being examined by any person having lawful authority in that behalf to examine him, shall refuse to answer directly and truly whether he be a jesuit, or a seminary or massing priest; he shall be committed to prison by such as shall so examine him, and there continue until

he shall make direct and true answer to the said questions whereupon he shall be so examined. § 11.

3. And by the 3 *J. c.* 5. Such person as shall first discover to any justice of the peace any recusant or other person who shall entertain or relieve any jesuit, seminary, or popish priest, or shall discover any mass to have been said, and the priest that said the same, within three days after the offence committed, and by reason of such discovery any of the said offenders shall be taken and convicted or attainted, —— shall not only be freed from the danger and penalty of any law for such offences, if he be an offender therein, but also shall have the third part of the forfeiture, so as the total exceed not 150*l.*; and if it do exceed 150*l.* he shall have the sum of 50*l.* for every such discovery: and after conviction of the offender, he shall have a certificate from the judges or justices of the peace before whom the conviction shall happen, to be directed to the sheriff or other officer who shall seize the goods or levy the forfeiture, commanding him to pay the same out of the monies to be levied by virtue of the said forfeitures. § 1.

[But by 31 *G.* 3. *c.* 32 § 4. No person who shall take and subscribe the oath therein appointed to be taken and subscribed (for which see Oaths, 20 B.) in manner thereby required, shall be presented, indicted, sued, impeached, prosecuted, or convicted in any civil or ecclesiastical court of this realm, for being educated in the popish religion, or for being a priest or deacon, or [131]
entering into or belonging to any ecclesiastical order or community of the church of Rome.

But the deportment of the ecclesiastic must be conformable to the regulations of the act; for which see *infra*, XLVI.]

X. *Saying or hearing mass.*

1. By the 23 *El. c.* 1. Every person who shall say or sing mass, shall forfeit 200 marks, and be committed to the next gaol for one year, and further till he have paid the said sum. And every person who shall willingly hear mass, shall forfeit 100 marks, and be imprisoned for a year. § 4.

Which said forfeitures, by another clause in the said act, shall be one third to the king to his own use: one third to the king for relief of the poor in the parish where the offence shall be committed, to be delivered by warrant to the principal officers in the receipt of the exchequer, without further warrant from the king; and one third to him who shall sue. And if such person shall not be able, or shall fail to pay the same within three months after judgment given, he shall be committed to prison till he have paid the same, or conform himself to go to church. § 11.

And the justices of assize and justices of the peace in their open quarter sessions, may inquire of, hear, and determine the same. § 9.

But if the offender shall, before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, or before the justices where he shall be indicted, arraigned, or tried (not having before made like submission at his trial being indicted for the first offence); he shall be discharged upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. § 10.

2. And by the 3 *J. c.* 5. Such person as shall first discover to any justice of the peace any mass to have been said, and the persons that were present at such mass, or any of them within three days next after the offence committed, and by reason of such discovery any of the said offenders shall be taken and convicted or attainted, shall not only be freed from the danger and
[132] penalty of any law for such offences if he be an offender, but also shall have the third part of the forfeiture, so as the total exceed not 150*l.*; and if it do exceed 150*l.* he shall have the sum of 50*l.* for every such discovery; and after conviction of the offender, he shall have a certificate from the judges or justices of the peace before whom the conviction shall happen, to be directed to the sheriff or other officer who shall seize the goods or levy the forfeiture, commanding him to pay the same out of the monies to be levied by virtue of the said forfeitures. § 1.

[But by 31 *G.* 3. *c.* 32. § 4. No person who shall take and subscribe the oath therein-before appointed to be taken and subscribed in manner thereby required, shall be presented, indicted, sued, impeached, prosecuted, or convicted in any civil or ecclesiastical court of this realm, for hearing or saying mass, or for being present at, or performing or observing any rite, ceremony, practice or observance of the popish religion, or maintaining or assisting others therein: the 23 *El. c.* 1. 27 *El. c.* 2. 35 *El. c.* 2. 1 *J.* 1. *c.* 4. 3 *J.* 1. *c.* 5. 3 *C.* 1. *c.* 2. and 25 *C.* 2. *c.* 2. notwithstanding.

But the place of meeting and the deportment of the ecclesiastic must be conformable to the regulations of the act, for which see *infra*, XLVI.]

XI. *Frequenting conventicles.*

By the 1 *W. c.* 18. commonly called the act of toleration, Every justice of the peace may require any person that goes to any meeting for the exercise of religion, to make and subscribe the declaration of the 30 *C.* 2. against popery, and also to take the oaths of allegiance and supremacy (or the declaration of

fidelity in case he scruples to take an oath); and upon refusal thereof, shall commit him to prison without bail, and shall certify the name of such person to the next sessions; and if he shall upon a second tender at the sessions refuse to make and subscribe the declaration aforesaid, he shall be then and there recorded, and shall be taken thenceforth for a popish recusant convict, and suffer accordingly.

And there is a clause in the said act, that nothing in that act contained shall give any ease, benefit or advantage, to any papist or popish recusant whatsoever.

[But by the 31 *G.3.* §4. No person conforming to it in the manner above stated, shall be prosecuted for being a papist, or reputed papist, or for professing, or being educated in the popish religion, or performing any rite or ceremony thereof under certain regulations; for which see *infra*, XLVI.]

XII. *Foreign education of papists.* [133]

1. By the 1 *J. c.*4. Every person who shall pass or go, or shall send any child or any other person under his government, into any the parts beyond the seas, out of the king's obedience, to the intent to enter into or be resident in any college, seminary, or house of Jesuit priests, or any other popish order, profession or calling, or repair to any the same, to be instructed, persuaded or strengthened in the popish religion, or in any sort to profess the same; every such person so sending any child or other person beyond the seas to any such purpose, shall forfeit to the king 100*l.*; and every such person so passing or being sent, shall in respect of himself only, and not of his heirs or posterity, be disabled to inherit, purchase, take, have or enjoy any lands, profits, goods, debts, duties, legacies or sums of money within this realm, and all estates and interest in trust for him shall be void. § 6.

But if such person or child so passing or sent shall after become conformable and obedient to the laws of the church, and shall repair to church, and continue in such conformity; he shall during such time as he shall so continue, be discharged of every such disability and incapacity. § 7.

And by the same act, No woman, or any child under the age of twenty-one years (except sailors or ship-boys, or the apprentice or factor of a merchant) shall be permitted to pass over the seas (except by licence of the king, or of six or more of the privy council under their hands); on pain that the officer of the port, that shall willingly or negligently suffer any such to pass, or shall not enter the names of such passengers licensed, shall forfeit his office and his goods; and on pain that the owner of the ship that shall wittingly or willingly carry any such over sea without such licence, shall forfeit the ship and tackle; and every master or

mariner of or in any vessel offending as aforesaid, shall forfeit his goods, and be imprisoned for twelve months. § 8.

The one half of all which forfeitures shall be to the king, and half to him that will sue. § 9.

2. And by the 3 *J. c.* 5. If the children of any subject within this realm, (the said children not being soldiers, mariners, merchants or their apprentices or factors) to prevent their good education in England, or for any other cause, shall be sent or go
[134] beyond seas, without licence of the king, or of six of the privy council (whereof the principal secretary to be one) under their hands and seals: every such child shall take no benefit by any gift, conveyance, descent, devise or otherwise of any lands, leases or goods, until he, being of the age of eighteen years, take the oaths of allegiance and supremacy before a justice of the peace where the parent shall inhabit; and in the mean time the next of kin, who shall be no popish recusant, shall enjoy the same until he shall conform himself and take the said oaths and receive the sacrament: And after such oaths taken, and conforming and receiving the sacrament, he who received the profits shall make account thereof, and in reasonable time make payment thereof, and restore the value of such goods. § 16.

And all such persons as shall so send such child or children over seas, shall forfeit 100*l.* to him who shall discover and convict the offender. 11 & 12 *W. c.* 4. § 6. § 16.

3. And by the 3 *C. c.* 2. If any person shall pass or go, or shall convey or send, or cause to be sent or conveyed any child or other person into any parts beyond the seas out of the king's obedience, to the intent and purpose to enter into or be resident or trained up in any priory, abbey, nunnery, popish university, college or school, or house of jesuits, priests, or in any private popish family, and shall be there by any jesuit, seminary priest, friar, monk, or other popish person, instructed, persuaded or strengthened in the popish religion; in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent any sum of money or other thing, for the maintenance of any child or other person gone or sent and trained and instructed as is aforesaid, or under colour of any charity, benevolence or alms towards the relief of any priory, abbey, or nunnery, college, school or any religious house; every person so sending, conveying, or causing to be sent and conveyed, as well any such child or other person, as any sum of money or other thing, and every person being sent beyond the seas, shall be disabled to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity, or to be committed of any ward, or executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office; and shall forfeit his goods, and shall forfeit his lands during life. § 1.

The said offences to be inquired of, heard, and determined in the king's bench, or at the assizes of such counties where the offenders did last dwell or abide, or whence they departed out of [135]
the realm, or where they were taken. § 3.

Provided that no person so sent or conveyed, that shall within six months after his return conform himself to the established religion, and receive the sacrament according to the statutes made concerning the conformity from popish recusants, shall incur any the said penalties. § 2.

And if at any time after the said six months he shall so conform himself, he shall have his lands restored, during the time that he shall so continue in such conformity. § 4.

XIII. *Popish children of protestants.*

If any person not bred up by his parents from his infancy in the popish religion, and professing himself to be a popish recusant, shall breed up, instruct or educate his child or children, or suffer them to be instructed or educated in the popish religion, he shall be disabled of bearing any office or place of trust or profit, in church or state: And all such children as shall be so brought up, instructed or educated, shall be disabled of bearing any such office or place of trust or profit until they be perfectly reconciled and converted to the church of England, and shall take the oaths of allegiance and supremacy before the justices of the peace at the quarter sessions of the place where they shall inhabit, and thereupon receive the sacrament of the Lord's supper, and obtain a certificate thereof, under the hands of two of the said justices. 25 *C.* 2. *c.* 2. § 8. [And by the 31 *G.* 3. *c.* 32., though popish schools are permitted under certain regulations, (for which see Schools, 4.) no schoolmaster professing the Roman catholic religion shall receive into his school for education the child of any protestant father. § 25.]

XIV. *Popish children of papists.*

If any popish parent, in order to compel his protestant child to change his religion shall refuse to allow him a fitting maintenance, suitable to the degree and ability of such parent, and to the age and education of such child; then upon complaint thereof to the lord chancellor, he shall make order therein. 11 *&* 12 *W.* *c.* 4. § 7.

[And the court of chancery will also superintend the education of such protestant child, and imopse restrictions on the access and correspondence of his parents. *Blake* v. *Leigh*, *Amb.* 306.]

XV. *Papists not repairing to church.*

1. By the 5 & 6 *Ed.* 6. *c.* 1. § 2. 1 *El. c.* 2. § 14. *All persons* shall diligently and faithfully, *having no lawful or reasonable excuse* to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof *to some other usual place* where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holydays, and then and there *to abide orderly and soberly during the time* of common prayer, preaching or other service of God there to be used and ministered; on pain of punishment by the censures of the church [and also upon pain that every person so offending shall forfeit for every such offence 12*d.*; to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods, lands, and tenements of such offender, by way of distress. 1 *El. c.* 2. § 14. *only.*] See *tit.* Dissenters, I. 2. Holidays, 4. Public worship, I.

And all archbishops, bishops, and all other their officers exercising ecclesiastical jurisdiction, as well in places exempt as not exempt, within their diocese, shall have power to reform, correct, and punish by censures of the church all offenders within any their jurisdiction or diocese. § 16.

And the justices of assize may inquire of, hear, and determine the same. § 17.

And the archbishop or bishop may at his liberty and pleasure associate himself to the justice of assize, for the inquiring of, hearing, and determining the same. § 18.

But no person shall be molested for the said offence unless he *be thereof indicted* at the next assize. § 20.

And the mayor of London, and all other mayors, bailiffs, and other head officers of cities, boroughs, and towns corporate to which the justice of assize do not commonly repair, shall have power to inquire of, hear, and determine the same yearly within fifteen days after Easter and Michaelmas, in like manner as the justices of assize may do. § 22.

And all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries, having any peculiar ecclesiastical jurisdiction, shall have power as well to inquire in their visitation synods; and elsewhere within their jurisdiction, at any other time and place, to take accusations and informations of the said offences committed within the limits of their jurisdiction, and to punish the same by admonition, excom-
[137] munication, sequestration, or deprivation, and other censures and process in like form as heretofore hath been used in like cases by the king's ecclesiastical laws. § 23.

Provided, that whatsoever persons offending in the premises

shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary's seal, shall not for the same offence eftsoons be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for, the same offence eftsoons receive punishment of the ordinary. § 24.

All persons] Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act. 1 *W. c.* 18. § 2. 16. [And persons who shall take the oaths, and come to some congregation or place of religious worship permitted to Roman catholicks, by 31 *G.* 3. *c.* 32. — § 9.]

Having no lawful or reasonable excuse] It hath been holden, that the indictment need not to shew that the party had no reasonable excuse for his absence; but the defendant if he have any matter of this kind in his favour, ought to shew it. 1 *Haw.* 13.

And if the spiritual court proceeding upon this statute, refuse to allow a reasonable excuse, they may be prohibited: but if they proceed wholly on their own canons, they shall not be at all controlled by the common law, unless they act in derogation from it, as by questioning a matter not triable by them, as the bounds of a parish or the like; for they shall be presumed to be the best judges of their own laws. 1 *Haw.* 13.

To some other usual place] And he who is absent from his own parish church shall be put to prove where he went to church. 1 *Haw.* 13.

To abide orderly and soberly during the time] He who misbehaves himself in the church, or misses either morning or evening prayer, or goes away before the whole service is over (7), is as much within the statute as he who is wholly absent. 1 *Haw.* 13.

Thereof be indicted] The offence in not coming to church consisting wholly in a non-feasance and not supposing any fact done, but barely the omission of what ought to be done, needs not be alleged in any certain place; for, properly speaking, it is not committed any where. 1 *Haw.* 13.

And by the 3 *J. c.* 4. The justices of assize and justices of the peace in sessions shall have power to inquire, hear, and determine [138] of all recusants and offences for not repairing to church according to the meaning of former laws, as the justices of assize may do by such former laws; and also shall have power at their assizes, and at the sessions (in which any indictment against any person for not repairing to church according to such former laws shall be taken), to make proclamation, by which it shall be commanded that the body of such offender be rendered to the sheriff or other keeper of the gaol, before the next assizes or before the next

(7) See *Gibs.* 964. cited *infra*, Public worship, I. 3.

sessions respectively; and if at the said next assizes or sessions the offender so proclaimed shall not make appearance of record, then upon every such default recorded, the same shall be as sufficient conviction in law, as if upon the indictment a verdict had been found and recorded. § 7.

And by the same statute of 3 *J. c.* 4. 'If any person shall not resort every *Sunday* to some church, chapel, or usual place of common prayer, and there hear divine service, according to the 1 *El. c.* 2., one justice of the peace of that division where the party shall dwell, on proof to him made of such default by confession, or oath of witness, may call the said party before him; and if he shall not make a sufficient excuse and due proof thereof to the satisfaction of the said justice, he may give warrant to the churchwarden of the said parish wherein the said party shall dwell, to levy 12*d.* for every such default by distress and sale; and in default of such distress, the said justice may commit him to some prison within the shire, division, or liberty wherein such offender shall be inhabiting, till payment be made; which said forfeiture shall be to and for the use of the poor of that parish wherein the offender shall be abiding at the time of the offence committed. § 27.

But no man shall be impeached upon this clause, except he be called in question for his default within one month after the said default made. § 28.

And no man being punished according to this branch, shall for the same offence be punished by the 1 *El. c.* 2. Id. § 29.

2. By the 23 *El. c.* 1. Every person above the age of sixteen years, who shall not repair to some church, chapel, or usual place of common prayer, *but forbear the same contrary to the* 1 *El. c.* 2. *shall forfeit to the queen's majesty for every month* which he shall so forbear 20*l.*; and over and besides the said forfeitures, every person so forbearing by the space of twelve months shall,
[139] after certificate thereof in writing made into the king's bench by the bishop of the diocese or a justice of assize, or a justice of the peace of the county where the offender shall dwell, be bound with two sufficient sureties in 200*l.* at least, to the good behaviour, and so to continue bound until he conform himself and come to church. § 5. Which said forfeiture shall be *one third to the king to his own use; one third to the king for relief of the poor in the parish where the offence shall be committed*, to be delivered by warrant to the principal officers in the receipt of the exchequer without further warrant from the king; *and one third to him who shall sue.* And if such person shall not be able, or shall fail to pay the same within three months after judgment given; he shall be committed to prison till he have paid the same, or conform himself to go to church. § 11.

[And by 29 *El. c.* 6. § 7. the lord treasurer, chancellor, and

chief baron, or two of them, may dispose of the third part thereof, for the maintenance as well of the poor and of the houses of correction as of impotent and maimed soldiers.]

But if the offender shall before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, or before the justices where he shall be indicted, arraigned, or tried (having not before made like submission at his trial being indicted for the first offence); he shall be discharged upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. § 10.

Also every person which usually on the Sunday shall have in his house divine service by law established, and be thereat himself most commonly present, and shall not obstinately refuse to come to church, and shall also, four times a year at least, be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease, shall not incur any pain or penalty for not repairing to church. § 12.

And every grant, conveyance, bond, judgment, and execution, made of covinous purpose to defraud any interest, right, or title that may or ought to grow to the king or to any other person by any conviction or judgment on this statute, shall be void against the king and against such as shall sue for such penalty as aforesaid. § 13.

But forbear the same contrary to the 1 *El. c.* 2.] A person who was sick for part of the time contained in an information upon this statute, shall not be at all excused by reason of such sickness, if it be proved that he was a recusant both before and after; for it shall be intended that he obstinately forbore during that time. 1 *Haw.* 14.

Shall forfeit to the queen's majesty for every month] It hath been resolved, that this statute by inflicting 20*l.* for a month's [140]
absence, dispenseth not with the forfeiture of 12*d.* for the absence of one Sunday; for both may well stand together; and the 12*d.* is immediately forfeited upon the absence of each particular day. 1 *Haw.* 13.

For every month] The time of a month intended by this statute, shall be computed not by the kalendar, but by the number of days, allowing twenty-eight days to each, according to the common rule of expounding statutes, which speak generally of a month. 1 *Haw.* 14.

One third to, &c.] This clause for distribution of the forfeitures is nevertheless consistent with the former part, in giving the whole forfeiture to the queen; it being usual in acts of parliament, to give the whole penalty for any criminal matter to the

king, and afterwards in the same act to make distribution thereof and to give part to him that will sue. 1 *Haw.* 18.

And by the 29 *El. c.* 6. it is further enacted, that every feoffment, gift, grant, conveyance, alienation, estate, lease, incumbrance, and limitation of use, of or out of any lands, made by any person which hath not repaired, or shall not repair to some church, chapel, or usual place of common prayer, contrary to the 23 *El. c.* 1. and which is revocable at the pleasure of such offender, or in any wise directly or indirectly intended for the behoof, relief, or maintenance, or at the disposition of such offender, or whereby such offender or his family shall be maintained,—shall be utterly void as against the king for levying the penalties. § 1.

But this shall not extend to make void or impeach any grant or lease made *bonâ fide*, without fraud or covin, whereupon the accustomed yearly rent or more shall be reserved, or any other conveyance made *bonâ fide* upon good consideration, and without fraud or covin, which shall not be recoverable at the pleasure of the offender, otherwise than to give benefit to the king to enjoy such rents and payments during the continuance of such lease and grant. § 8.

And every conviction for such offence shall be in the king's bench or at the assizes, and not elsewhere; and shall from the justices before whom the record of such conviction shall remain, be estreated into the exchequer before the end of the term next ensuing such conviction. § 2.

And every such offender in not repairing to church as shall be thereof once convicted, shall in such of the terms of Easter or
[141] Michaelmas as shall be next after such conviction, pay into the exchequer after the rate of 20*l.* for every month which shall be contained in the indictment whereupon the conviction shall be; and shall also, for every month after such conviction, without any other indictment or conviction, pay into the exchequer at two times a-year, viz. in every Easter and Michaelmas term, as much as shall then remain unpaid, after the rate of 20*l.* for every month after such conviction. And if default shall be made in any part of any payment aforesaid, *the queen may*, by process out of the exchequer, *seize all the goods and two parts of the lands* liable to such seizure or to the penalties aforesaid, leaving the third part only of such lands for the maintenance of the offender and his family. § 4.

And for the more speedy conviction of such offender in not repairing to divine service, the indictment mentioning the not coming of such offender to the church of the parish where he at any time before such indictment was or did keep house or residence, nor to any other church, chapel, or usual place of common prayer, shall be sufficient in the law; and it shall not be needful to mention in the indictment that the offender was or is

inhabiting within this realm; but if it shall happen any such offender then not to be within this realm, the party shall be relieved by plea to be put in and not otherwise: And upon the indictment of such offender, a proclamation shall be made at the assizes in which the indictment shall be taken (if the same be taken at any assize), by which it shall be commanded, that the body of such offender shall be rendered to the sheriff before the next assizes; and if at the said next assizes the offender so proclaimed *shall not appear of record*, then upon such default recorded, the same shall be as sufficient a conviction in law of the said offence as if a trial had been by verdict. § 5.

Provided, that when such offender shall make submission and conform, or shall die; no forfeiture of 20*l.* for any month or seizure of the lands of the offender, from such submission and conformity or death, and satisfaction of all the arrearages of 20*l.* monthly, before such seizure due or payable, shall ensue or be continued against such offender. § 6.

And the lord treasurer, chancellor, and chief baron of the exchequer, or two of them, may assign such third part given to the poor by the former act, as well for relief of the poor, and of the houses of correction as of impotent and maimed soldiers; as they [142] or any two of them shall appoint. § 7.

And this act shall not extend to continue any seizure of any lands of such offender in the queen's hands, after the offender's death, which lands he shall have only for term of his life, or in the right of his wife. § 9.

May seize all the goods] The king, according to the better opinion, may seize the goods, but not grant them over, without an inquisition to be taken. 1 *Haw.* 20.

And two parts of the lands] But the king cannot seize the lands till it appears by the return of an inquisition to that purpose to be awarded, of what lands the offender was seised; because the king's title to lands ought always to appear of record. 1 *Haw.* 20. [*See* 3 *J.* 1. *c.* 4. § 11, 12. *infra*, 143.]

Shall not appear of record] If a recusant who was proclaimed at the assizes, render himself at the next assizes to plead or traverse; he must appear in person, and he is to be in custody; for the words of the statute and of the proclamation are, that he shall render his body to the sheriff. *Kelyng.* 35.

Of record] An actual personal appearance of the defendant will no way avail him, unless the same be entered of record. 1 *Haw.* 16.

And by the 1 *J. c.* 4. Where any seizure shall be had of the two parts of the lands for the not payment of 20*l.* a month; such two parts shall, according to the extent thereof, go towards the payment of such 20*l.* a month being unpaid by any such recusant: and the third part thereof shall not be extended or seized by the

king for not payment of the said 20*l.* a month. And where any seizure shall be had of the two parts as aforesaid, and such recusant shall die, the debt or duty by reason of his recusancy not being discharged; in such case the same two parts shall continue in his majesty's possession until the residue of the said debt or duty shall be discharged: and the king shall not seize or extend any third part descending to any such heirs, either by reason of the recusancy of his ancestors, or the recusancy of any such heirs. § 5.

And moreover, by the 3 *J. c.* 4. it is further enacted, that every offender in not repairing to divine service, being once convicted, shall in such of the terms of Easter and Michaelmas as shall be next after such conviction, pay into the receipt of the exchequer after the rate of 20*l.* for every month which shall be contained in the indictment whereupon such conviction shall be; and shall also for every month after such conviction, without any other in-
[143] dictment or conviction, forfeit 20*l.* and pay into the receipt of the exchequer aforesaid at two times in the year, viz. in every Easter and Michaelmas term, as much as shall then remain unpaid after the rate of 20*l.* for every month after such conviction; except in such cases where the king may by this act refuse the same, and take two parts of the lands of such offender, till the said party being indicted for not coming to church contrary to former laws shall conform himself and come to church. § 8.

And every conviction so recorded, shall by the justices before whom the record of the conviction shall be, be certified into the exchequer, before the end of the term following such conviction, in such convenient certainty for the time and other circumstances, as the court of exchequer may thereupon award process for the seizure of the lands and goods of every such offender as the cause shall require: And if default shall be made in any part of any payment aforesaid contrary to the form hereinbefore limited; then, and so often, the king may by process out of the exchequer seize all the goods, and two parts as well of all the lands, leases, and farms of such offender, as of all other lands liable to seizure, or to the penalties aforesaid by the true meaning of this act, leaving the third part only of the said lands, leases, and farms for the maintenance of the offender, his wife, children, and family. § 9.

And the king shall have power to refuse the 20*l.* a month though it be tendered ready to be paid, and thereupon to seize two parts in three to be divided as well of all the lands, leases, and farms that at the time of such seizure shall be or afterwards shall come to any such offender in not coming to church, or to any other to his use, as of all other lands liable to such seizure, or to the penalties aforesaid, and the same to retain till such offender shall conform himself, in lieu of the 20*l.* monthly that during such his seizure and retainer shall incur. Saving to all

persons (other than the offender, his heirs, or others claiming to his or their use,) all leases, rents, conditions, and other rights and titles made and done without fraud. § 11.

But the king shall not take into his two parts, but leave to such offender, his chief mansion house, as part of his third part; and shall not demise, lease, nor put over the said two parts, nor any part thereof, to any recusant, nor to his use: And whosoever shall take the same in lease or otherwise of his majesty, shall give such security not to commit nor suffer waste, as by the court of exchequer shall be allowed. § 12.

And no indictment against any person for not coming to church, nor any proclamation, outlawry, or other proceeding thereupon, *shall be reversed for any default in form*, nor otherwise than by direct traverse to the point of not coming to church. § 16. [144]

Provided, that if such person indicted shall submit and conform and repair to church, he may from thence be admitted to avoid and reverse the indictment and all proceedings thereupon, as if this act had not been made. § 17.

And every of the said offences against this act may be inquired of, heard, and determined before the justices of the king's bench or of assize, or before the justices of the peace in sessions. § 36.

Shall be reversed for any default in form.] But it hath been resolved, that the party is only restrained from taking advantage of defects in the record itself, and that he may plead any collateral matter, as a pardon, or a former conviction. 1 *Haw.* 17.

And that he may even reverse a judgment after verdict for any such defect in the record itself, as tends to the king's prejudice, as the omission of a capiatur or the like: and that he may reverse an outlawry for any common defect, upon putting in bail, and traversing the indictment as to the point of not coming to church; which is very agreeable to the purport of the whole clause, the latter part whereof seems manifestly to qualify the generality of the former. 1 *Haw.* 17.

[By the 31 *G.* 3. *c.* 32. § 3. No person who shall take and subscribe the oath therein before appointed to be taken and subscribed by papists (for which see **Oaths**, 20 B.), shall be convicted or prosecuted upon, or shall be liable to be prosecuted upon the last recited statutes, or any of them, or upon any other statute, or any other law of this realm, by indictment, information, action of debt or otherwise, or shall be prosecuted in any ecclesiastical court, for not resorting or repairing to his or her parish church or chapel, or some other usual place of common prayer, to hear divine service, and join in public worship, according to the forms and rites of the church of England, as by law established. But the laws for frequenting divine service on *Sunday*, shall continue in force against all persons except those who shall come to some congregation or place of religious

worship permitted by that act (for which see *infra* XLVI.) or the act of Toleration.]

[145] XVI. *Perverting others, or being perverted to popery.*

By the 23 *El. c.* 1. *All persons who shall* have or *pretend to have power or shall put in practice* to absolve, persuade, or withdraw any of the subjects from their natural obedience, or to withdraw them for that intent from the established to the Romish religion, or to move them to promise any obedience to any pretended authority of the see of Rome or of any other prince, state, or potentate to be had or used within this realm, or shall do any overt act to that intent or purpose, shall be guilty of high treason. § 2.

And if any person shall be willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall promise any obedience to any such pretended authority, prince, state, or potentate; he, his procurers and counsellors, shall be guilty of high treason. § 2.

And all persons that shall wittingly be aiders or maintainers of such persons so offending, knowing the same, or shall conceal any such offence, and shall not within twenty days after their knowledge of the offence disclose the same to a justice of the peace or other high officer, shall be guilty of misprision of treason. § 3.

Pretend to have power, or shall put in practice] Upon the indictment against *Campion* and others, 33 *El.* concerning which the judges were assembled at Serjeants' Inn, it was resolved by them, that if any person shall pretend to have power to absolve, though he move none with an intent to draw them from their obedience; or shall move any with an intent to draw them from their obedience, though he pretend not to have power to absolve; both these acts, singly taken, are treason within the purview of this statute. *Gibs.* 536. [*Savil.* 3.]

XVII. *Entering into foreign service.*

By the 3 *J. c.*4. If any gentleman or person of higher degree, or any person that shall bear any office or place of captain, lieutenant, or any other place, charge, or office, in camp, army, or company of soldiers, or conduct of soldiers, shall go voluntarily out of the realm to serve any foreign prince, state, or potentate, or shall voluntarily serve any such, before he shall become bound by obligation with two such sureties, as shall be allowed of by the officers, who shall take the bond unto the king in the sum of 20*l.* at the least with condition to the effect following, shall be a felon. The tenor of which condition followeth; § 19.

That if the within bounden *A. B.* shall not at any time then after

be reconciled to the pope or see of Rome, nor shall enter into or consent unto any plot or conspiracy whatsoever against the king's majesty, his heirs and successors, or any his and their estate and estates, realms or dominions, but shall within convenient time after knowledge thereof had, reveal and disclose to the king's majesty, his heirs and successors, or some of the lords of his or their honourable privy council, all such practices, plots, and conspiracies; that then the said obligation to be void. § 20.

And the customer and comptroller of every port, haven, or creek, or one of them, or their or either of their deputy, may take the said bond; taking for the same 6*d.* and no more. Which said customer and comptroller shall register and certify every such bond into the court of exchequer once every year, on pain of 5*l.* § 21.

And where any such person shall pass out of the cinque ports or any member thereof; the lord warden of the cinque ports, or any person by him appointed, may take such bond as aforesaid. § 42.

XVIII. *Refusing the oaths and subscriptions.*

1. By the 7 *J. c.* 6. If any person of or above the degree of a baron or baroness, and above the age of eighteen years, shall stand and be presented, indicted, or convicted for not coming to church, or not receiving the sacrament according to law, before the ordinary, or other having lawful power to take such presentment or indictment; then three of the privy council, whereof the lord chancellor, lord treasurer, lord privy seal, or principal secretary to be one, upon knowledge thereof shall require such person to take the oaths of allegiance and supremacy: And if any other person of and above the said age and under the said degree, shall so stand and be presented, indicted, or convicted; or if the minister, petty constable, and churchwardens, or any two of them, shall complain to any justice of the peace, near adjoining to the place where any person complained of shall dwell, and the said justice shall find cause of suspicion; then any one justice of the peace, within whose commission or power such person shall be, or to whom complaint shall be made, shall upon notice thereof require such person to take the said oaths. And if any person being of the age of eighteen years or above shall refuse to take [147]
the said oaths duly tendered; then the persons authorised to give the said oaths, shall commit him to the common gaol till the next assizes or sessions, where the said oaths shall be again in the said open sessions required of such person, by the justices of assize or of the peace then and there present; and if he shall then also refuse, he shall incur a præmunire. (Except women

covert; who shall be committed only to prison, there to remain without bail till they will take the said oaths.) § 26.

And every person refusing to take the said oaths, shall be disabled to execute any public place of judicature or bear any other office (being no office of inheritance or ministerial function), or to use or practise the common or civil law, or the science of physick or surgery, or the art of an apothecary, or any liberal science for gain. § 27.

By 31 *G.* 3. *c.* 32. Roman catholics who shall take and subscribe the oath and declaration herein contained, are exempted from prosecution for not resorting to a place of worship according to the rites of the church of England, provided they resort to a place of divine worship permitted by that act. Vid. *supra* XV. With regard to practitioners in Law, vid. *infra* XXXV.]

2. By the 13 *C.* 2. *st.* 2. *c.* 1. No person shall be placed, elected, or chosen to any office or place of mayor, alderman, recorder, bailiff, town clerk, common councilman, or other office of magistracy, place, or trust, or other employment relating to the government of cities, corporations, boroughs, cinque ports, and other port towns; who shall not have received the sacrament according to the rites of the church of England, within one year next before such election: and in default thereof, every such election and placing shall be void. (*a*)

3. And by the 25 *C.* 2. *c.* 2. For preventing dangers which may happen from popish recusants; every person who shall be admitted into any office civil or military, shall within three months after his admittance receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church on the Lord's day immediately after divine service and sermon; and shall at the same time that he takes the oaths (which shall be within six months after his admittance, 9 *G.* 2.
[148] *c.* 26.) deliver into the court a certificate of his having so received the sacrament under the hands of the minister and churchwarden, and shall make proof of the truth thereof, by two witnesses upon oath; all which shall be put upon record in the said court. § 2, 3.

And if he shall neglect or refuse so to do, he shall be disabled to hold such office, and the same shall be void. § 4.

And if he shall execute the same after such time is expired, and be convicted thereupon in the courts at Westminster or at the assizes; he shall be disabled to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy,

(*a*) See Dissenters, 4.

or deed of gift, or to bear any office, and shall forfeit 500*l.* to him who shall sue. § 5.

And at the same time when he takes the oaths, he shall also make and subscribe this declaration following, under the same penalties and forfeitures, viz. *I*, A. B., *do declare, that I do believe that there is not any transubstantiation in the sacrament of the Lord's supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever.* § 9.

[By 31 *G.* 3. *c.* 32. § 2. Roman catholics who may be chosen or otherwise appointed to bear the office of high constable or petty constable, churchwarden, overseer of the poor, or any other parochial or ward office, and shall scruple to take upon them any thing required by the law to be taken or done in respect of such employment, may and shall execute such office by a sufficient deputy, to be by them lawfully provided and approved, and who shall comply with the laws in this behalf. Vide 1 *G.* 1. *st.* 2. *c.* 13. § 18.

By the same act, § 18. no person shall be *summoned* to make the above-mentioned declaration against transubstantiation, or be prosecuted for not obeying such summons. *Q.* Whether this shall excuse a *neglect* or *refusal* to make it in the above-mentioned case?]

4. And by the 7 & 8 *W.* *c.* 27. Every person who shall refuse to take the oaths of allegiance and *supremacy*, when tendered to him by any person lawfully authorised to administer or tender the same; or shall refuse or neglect to appear when lawfully summoned in order to have the said oaths tendered to him, —— shall, until he have duly taken the said oaths, be liable to suffer as a popish recusant convict. And for the better levying the penalties to the king, the persons tendering the oaths shall upon such [149]
refusal or default of appearance record and enter in parchment the christian and surname, and place of abode of such person so refusing or not appearing, together with the time of such tender and refusal or default of appearance, and shall deliver the said record or entry to the justices of assize at the next assizes, who shall forthwith estreat the same into the exchequer to be there entered of record, that the court may proceed thereupon as against popish recusants convict. § 1.

And no person who shall refuse to take the said oaths, or being a quaker shall refuse to subscribe the declaration of fidelity (which oaths and subscription the sheriff or chief officer taking the poll at any election of members of parliament at the request of any one of the candidates shall administer), shall be admitted to give any vote at such election. § 19.

5. And by the 1 *G.* *st.* 2. *c.* 13. Two justices of the peace, or any other person who shall be by his majesty for that purpose specially appointed by order in the privy council or by commis-

sion under the great seal, may administer and tender the oaths of allegiance, *supremacy*, and abjuration to any person whom they shall suspect to be dangerous or disaffected to his majesty or his government: and if any person to whom the said oaths shall be so tendered, shall neglect or refuse to take the same; such justices or other person specially to be appointed as aforesaid, tendering the said oaths shall certify the refusal thereof to the next quarter sessions where such refusal shall be made; and the said refusal shall be recorded amongst the rolls of that sessions, and shall be from thence certified by the clerk of the peace into the chancery or king's bench, there to be recorded amongst the rolls of such court, in a roll to be there kept for that purpose only; and every person so neglecting or refusing to take the said oaths, shall be from the time of such neglect or refusal adjudged a popish recusant convict. § 10.

And two justices or any other person so specially appointed as aforesaid, by writing under their hands and seals may summon any person to appear before them at a certain day and time therein to be appointed, to take the said oaths; which said summons shall be served upon such person or left at his dwelling house or usual place of abode, with one of the family there; and if such person so summoned shall neglect or refuse to appear, then upon due proof upon oath of serving the said summons,
[150] such justices or other persons as aforesaid shall certify the same to the next sessions, there to be entered upon the rolls; and if such person shall neglect or refuse to appear and take the said oaths at the said sessions, the names of the person so certified being publicly read at the first meeting of the said sessions, such person shall be adjudged a popish recusant convict, and as such to forfeit and be proceeded against as if he had actually refused to take the oaths; and the same shall be from thence certified by the clerk of the peace into the chancery or king's bench, there to be recorded in a roll to be kept for that purpose only. § 11.

[But by 31 *G.* 3. *c.* 32. § 18. no person shall be *summoned* to take the oath of *supremacy*, or be prosecuted for not obeying such summons.]

XIX. *Armour and ammunition.*

1. By the 3 *J. c.* 5. All such armour, gunpowder, and munition, as any popish *recusant convict* shall have in his house or elsewhere, or in the possession of any other at his disposition, shall be taken from them by warrant of four justices of the peace at their general or quarter sessions to be holden in the county where such popish recusant shall be resident (other than such necessary weapons as shall be thought fit by the said justices to remain and be allowed for the defence of such recusant's person

or house): and the said armour and munition so taken, shall be kept at the costs of such recusant, in such places as the said four justices at their said sessions shall appoint. § 27.

And if such person shall refuse to declare unto the said justices, or to any of them, what armour he hath, or shall hinder or disturb the delivery thereof to any of the said justices, or to any other person authorised by their warrant to take and seize the same; he shall forfeit his said armour, gunpowder, and munition, and shall also be imprisoned by warrant of any justice of the peace of such county for three months. § 28.

And notwithstanding the taking away the same, the said popish recusant shall be charged with the maintaining of the same, and with the buying, providing, and maintaining of horse and other armour and munition, in such sort as other subjects shall be appointed and commanded according to their several abilities and qualities; and the said armour and munition, at the charge of such popish recusant for them, and as their own provision of armour and munition, shall be shewed at every muster, shew, or use of armour to be made within the said county. § 29. [151]

2. And by the 1 *W. c.* 15. It shall be lawful for any two justices of the peace who shall know or suspect any person to be a papist, or shall be informed that any person is, or is suspected to be a papist, to tender, and they shall forthwith tender to him the declaration of the 30 *C.* 2. *st.* 2. *c.* 1.: and if he shall refuse to make and subscribe the same, or shall refuse or forbear to appear before the said justices for the making and subscribing the same upon notice to him given or left at his usual place of abode by any person authorised in that behalf by warrant of the said justices; he shall from thenceforth be liable to all the penalties, forfeitures, and disabilities in this act mentioned. § 2.

And the said justices shall certify the name, surname, and usual place of abode of every such person, who being required shall refuse or neglect to make and subscribe the said declaration, or to appear before them for that purpose; as also of every person who shall make and subscribe the same,—at the next sessions, to be there filed and kept amongst the records. § 3.

And no papist or reputed papist so refusing or making default, shall have in his house or elsewhere, or in the possession of any other to his use or at his disposition, any arms, weapons, gunpowder or ammunition (other than such necessary weapons as shall be allowed to him by order of the justices in sessions, for the defence of his house or person): and two justices by their warrant may authorise any person in the day-time, with the assistance of the constable or his deputy, to search for all arms, weapons, gunpowder, or ammunition, which shall be in the house, custody, or possession of any such papist, or reputed papist, and seize the same for the use of the king; which said

justices shall at the next sessions deliver the same in open court for the use aforesaid. § 4.

And every papist, or reputed papist, who shall not within ten days after such refusal or making default as aforesaid, discover and deliver, or cause to be delivered to some justice of the peace, all arms, weapons, gunpowder, or ammunition whatsoever, which he shall have in his house or elsewhere, or which shall be in the possession of any person to his use; or shall hinder or disturb any person authorised by warrant of two justices to search for
[152] and seize the same, shall be committed to the common gaol by warrant of two justices for three months without bail, and shall also forfeit the said arms, and pay treble the value of them to the king, to be appraised by the justices at the next sessions. § 5.

And every person who shall conceal, or be privy or aiding or assisting to conceal, or who knowing thereof shall not discover to a justice of the peace the arms, weapons, gunpowder, or ammunition of any person so refusing or making default, or shall hinder or disturb any person authorised as aforesaid in searching for, taking, and seizing the same, shall be committed to the common gaol by two justices, for three months without bail, and shall also forfeit treble the value of the said arms to the king. § 6.

And if any person shall discover any concealed arms, weapons, ammunition or gunpowder belonging to any person refusing or making default as aforesaid, so as the same may be seized; the justices on delivery of the same at the sessions, shall as a reward for such discovery, by order of sessions allow him a sum of money amounting to the full value of the arms, weapons, ammunition or gunpowder so discovered: the said sum to be assessed by the judgment of the said justices at their said sessions, and to be levied by distress and sale of the goods of the offender. § 7.

But if any person who shall have so refused or made default, shall desire to submit and conform, and for that purpose shall present himself before the justices at the next sessions where his default shall be certified, and shall there in open court make and subscribe the said declaration, and take the oaths of allegiance and supremacy, he shall be discharged. § 8.

XX. *Horses.*

No papist or reputed papist, so refusing or making default in making and subscribing the declaration as by the last-mentioned act of the 1 *W. c.* 15., shall have or keep in his possession any horse above the value of 5*l.*; and two justices by their warrant may authorise any person, with the assistance of the constable or his deputy, to search for and seize the same for the use of the king. 1 *W. c.* 15. § 9.

And if any person shall conceal, or be aiding in concealing any such horse; he shall be committed to prison by such warrant without bail for three months, and shall also forfeit to the king treble value of such horse, which value is to be settled as aforesaid. § 10. (*b*). [153]

XXI. *Popish baptism.*

Every popish recusant who shall have a child born, shall, within one month next after the birth, cause the same to be baptised by a lawful minister, according to the laws of the realm, in the open church of the parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or if by infirmity of the child it cannot be brought to such a place, then the same shall within the time aforesaid be baptised by the lawful minister of any of the said parishes or places: on pain that the father of such child if he be living one month after the birth, or if he be dead then the mother of such child, shall forfeit 100*l.*; one third to the king, one third to him who shall sue in any of the king's courts of record, and one third to the poor of the said parish. 3 *J. c.* 5. § 14.

XXII. *Popish marriage.*

1. By the 3 *J. c.* 5. Every man, *being a popish recusant convict*, who shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate of freehold into any lands of his wife as tenant by courtesy; and every woman being a popish recusant convict, [154] who shall be married in other form than as aforesaid, shall be disabled not only to claim any dower of the inheritance of her husband, or any jointure of the lands of her husband, but also of her.

(*b*) It is to be observed here, that the 1 *W. c.* 15. which introduces the penalties and disabilities mentioned in this and the preceding number, is not noticed by the 31 *G.* 3. *c.* 32.; and the 30 *C.* 2. *st.* 2. *c.* 1. is not farther mentioned in that act, than with regard to persons coming into the king's presence, &c. *Vid.* the act, § 20. *et infra*, XXXII. May not therefore the declaration of the 30 *C.* 2. *st.* 2. *c.* 1. (against transubstantiation and the adoration of saints, *infra*, XXIX.) still be required of catholics, who have conformed to the 31 *G.* 3. *c.* 32., and must they not make it in order to avoid the two last mentioned disabilities? especially as the penalties of the 1 *W. c.* 15. attach not upon conviction in a prosecution or suit in any court for being a papist, &c. which is remedied by 31 *G.* 3. *c.* 32. § 4. but upon certificate by two justices of the peace, of the refusal of a papist or reputed papist to make and subscribe the above-mentioned declaration.

widow's estate and frankbank in any customary lands whereof her husband died seised, and likewise be disabled to have any part of her husband's goods: And if any such man shall be married with any woman, otherwise than as aforesaid, which woman shall have no lands whereof he may be entitled to be tenant by the courtesy; he shall forfeit 100*l.*, half to the king, and half to him that shall sue in any of the king's courts of record. § 13.

2. But by the 26 *G.* 2. *c.* 33. § 8. After March 25. 1754, if they shall be married any where in England, other than in a church or public chapel (unless by special licence from the archbishop of Canterbury), or without publication of banns, or licence, the marriage shall be void. [And by § 12. nothing in the 31 *G.* 3. *c.* 32. shall extend to repeal any part of 26 *G.* 2. *c.* 33.] (8).

XXIII. *Popish burial.*

If any popish recusant, man or woman, not being excommunicate, shall be buried in any place, other than in the church or churchyard, or not according to the ecclesiastical laws of this realm; the executors or administrators of every such person so buried, knowing the same, or the party that causeth him or her to be so buried, shall forfeit 20*l.*, one third to the king, one third

(8) It seems admitted in *Scrimshire* v. *Scrimshire*, decided in 1752 by Sir *Edw. Simpson*, and reported 2 *Hagg. Rep.* 400, that as a priest popishly ordained is a legal presbyter, a marriage by him according to the English ritual is good, for he is allowed to be a legal priest: and after taking and subscribing the oath and declaration in 31 *G.* 3. *c.* 32. § 1. may perform such rite without incurring any penalty. *Id.* § 4. Thus it seems the better opinion that a marriage in this country after the popish ritual cannot be deemed legal: particularly, where there has been no consummation, for the act of parliament prescribing the form of marriage in this country has changed that condition in the contracting part in the Roman ritual, "if holy church permit," to "according to God's holy ordinances;" and this difference between the rituals, which are much alike, makes such a ceremony in this country nothing more than a contract. 2 *Hagg. Rep.* 401. 404, 405. This, however, by canon law is *ipsum matrimonium;* and that law (before 25. *March* 1754, from which day 26 *G.* 2. *c.* 33. § 13. took effect to the contrary) would have enforced solemnization according to the English rites, till which ceremony takes place no restitution of conjugal rights can be decreed, though an English priest had intervened, if the marriage were not by the English ritual. But in *Fielding's* case, in 1705, a marriage in Mr. *F.*'s own lodgings by a Romish priest in the suite of the Imperial Envoy, was held good on evidence of *verba de præsenti*, spoken in English, so as to convict Mr. *F.* of polygamy in a second marriage, but *non constat* that the ritual used was not the protestant. 5 *St. Tri.* 610.

to him that shall sue in any of the king's courts of record, and one third to the poor of the parish where such person died. 3 *J.* *c.*5. § 15. [And by the 31 *G.*3. *c.*32. § 11. the benefit of that act shall not extend to any Roman catholic ecclesiastic who shall officiate at any funeral in any church or churchyard.]

XXIV. *Heirs of popish recusants.*

If any recusant shall die, his heir being no recusant; such heir shall be freed from all penalties and incumbrances in respect of his ancestor's recusancy: And if at the decease of such recusant his heir shall be a recusant, and after shall become conformable and obedient to the laws of the church, and repair to church, and continue there during the time of divine service and sermons, [155] and also shall take the oaths of allegiance and supremacy before the archbishop or bishop of the diocese; such heir shall be freed from all penalties and incumbrances happening by reason of his ancestor's recusancy. 1 *J.* *c.*4. § 3. 1 *W.* *c.*8.

But if the heir of any recusant shall be within the age of sixteen years at the decease of his ancestor, and shall after his age of sixteen years become a recusant; such heir shall not be freed of any of the penalties and incumbrances happening by reason of his ancestor's recusancy, until he shall submit or conform himself, and become obedient to the laws of the church, and repair to church, and take the oaths of allegiance and supremacy as aforesaid; and yet nevertheless, from and after such submission and oath taken, every such heir shall be freed from all penalties and incumbrances happening by reason of his ancestor's recusancy. 1 *J.* *c.*4. § 4. 1 *W.* *c.*8.

XXV. *Popish wife recusant convict.*

1. By the 3 *J.* *c.*5. Every married woman being a popish *recusant convict* (her husband not being a popish recusant convict) who shall not conform herself, but shall forbear to repair to some church or usual place of common prayer, there to hear divine service and to receive the sacrament, by the space of one whole year next before the death of her husband, —— shall forfeit to the king the issues and profits of two parts of her jointure and of her dower during her life, out of any lands which were her husband's, and also be disabled to be executrix or administratrix of her said husband, and to have or demand any part or portion of her said deceased husband's goods or chattels. § 10.

2. And by the 7 *J.* *c.*6. If any married woman, being convicted as a popish recusant for not coming to church, shall not in three months conform herself and repair to church and receive the sacrament: she shall be committed to prison by one of the

privy council, or the bishop of the diocese, if she be a baroness; or if she be under that degree, by two justices of the peace (one whereof to be of the quorum), until she shall conform herself and come to church and receive the sacrament; unless her husband shall pay to the king 10*l.* a month, or the third part of his lands at his own choice, so long as she remaining a recusant convict shall continue out of prison. § 28.

[156] XXVI. *Popish servants or sojourners.*

By the 3 *J. c.*4. Every person who shall willingly maintain, retain, relieve, keep, or harbour in his house, any servant, sojourner, or stranger, who shall not repair to some church, or chapel, or usual place of common prayer to hear divine service, but shall forbear the same for a month together, not having a reasonable excuse, shall forfeit 10*l.* a month. § 32.

And every person who shall knowingly retain or keep in his service, fee, or livery, any person who shall not repair to some church, chapel, or usual place of common prayer to hear divine service, but shall forbear the same for a month together, shall forfeit 10*l.* a month. § 33.

But this shall not extend to punish or impeach any person, for maintaining, retaining, relieving, keeping, or harbouring his father or mother wanting (without fraud or covin) other habitation or sufficient maintenance, or the ward of any such person, or any person that shall be committed by authority to the custody of any by whom they shall be so relieved, maintained, or kept. § 34.

The said offences to be inquired of, heard, and determined, before the justices of the king's bench, or of assize, or before the justices of the peace in sessions. § 36.

[But by the 31 *G.*3. *c.*32. § 3. No person who shall take and subscribe the oath therein before appointed to be taken (for which see Oaths, 20 B.) shall be convicted or prosecuted upon the statute of 3 *J. c.*4. for keeping or having any servant or other person, being a papist or reputed papist, or person professing the popish religion, who shall not so repair to his or her parish church or chapel, or some such other usual place of common prayer as aforesaid.]

XXVII. *Popish schoolmasters.*

1. By the 23 *El. c.* 1. If any person shall keep or maintain any schoolmaster, which shall not repair to church or be allowed by the bishop of the diocese; he shall forfeit 10*l.* a month. § 6.

Provided, that no such ordinary or their ministers, shall take any thing for the said allowance.——And if such schoolmaster

or teacher shall teach contrary to this act; he shall be disabled to be a teacher of youth, and be imprisoned for a year. § 7.

The said forfeiture to be, one third to the king to his own use; one third to the king for relief of the poor in the parish where the offence shall be committed, to be delivered by warrant to the principal officers in the receipt of the exchequer without further warrant from the king; and one third to him who shall sue: and if such person shall not be able, or shall fail to pay the same within three months after judgment given, he shall be committed to prison till he have paid the same, or conform himself to go to church. § 11.

But if the offender shall, before he be indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, or before the justices where he shall be indicted, arraigned, or tried (having not before made like submission at his trial being indicted for the first offence); he shall be discharged, upon his recognition of such submission in open assizes or sessions of the county where he shall be resident. § 10.

2. And by the 1 *J. c.*4. No person shall keep any school or be a schoolmaster, out of any of the universities or colleges of this realm, except it be in some public or free grammar school, or in some such nobleman's or gentleman's house as are not recusants, or where the schoolmaster shall be specially licensed by the archbishop, bishop, or guardian of the spiritualities of the diocese; on pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster, shall forfeit each of them 40*s.* a day; the one half of which forfeitures shall be to the king, and half to him that will sue. § 9.

[But by the 31 *G.*3. *c.*32. Roman catholics who have conformed to the regulations of that act are entitled to teach youth as tutors or schoolmasters, under certain regulations; for which see Schools, 4.]

XXVIII. *Papists shall not succeed to the crown of this realm.*

1. By the 1 *W. sess.*2. *c.*2. Every person that shall be reconciled to, or shall hold communion with, the see or church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm; and in such [158] case the people shall be absolved of their allegiance; and the crown shall descend to, and be enjoyed by, such person, being a protestant, as should have inherited and enjoyed the same, in case

the person so reconciled, holding communion, or professing, or marrying as aforesaid were naturally dead. § 9.

And every king and queen who shall come to and succeed to the imperial crown of this kingdom, shall on the first day of the meeting of the first parliament next after their coming to the crown, sitting on the throne in the house of peers in the presence of the lords and commons, or at their coronation before such person who shall administer the coronation oath at the time of their taking the said oath (which shall first happen) —— make and subscribe the declaration of the 30 *C.* 2. But if he or she shall be under the age of twelve years, then every such king and queen shall make and subscribe the same at their coronation, or at the first day of the meeting of the first parliament as aforesaid, which shall first happen after such king or queen shall have attained the said age of twelve years. § 10.

2. And by the second article of the union of the kingdoms of England and Scotland, All papists, and persons marrying papists, shall be excluded from, and for ever incapable to inherit, possess, or enjoy the imperial crown of Great Britain and the dominions thereunto belonging; and in every such case, the crown and government shall descend to, and be enjoyed by, such person, being a protestant, as should have inherited and enjoyed the same in case such papist or person marrying a papist was naturally dead. 5 *An. c.* 8.

XXIX. *Papists shall not sit in either house of parliament.*

By the 30 *C.* 2. *st.* 2. *c.* 1. No person that shall be a peer of the realm, or member of the house of peers, shall vote or make his proxy in the house of peers (*c*), or sit there during any debate in the said house of peers; nor any person that shall be a member of the house of commons, shall vote in the house of commons, or sit there during any debate after the speaker is chosen; until he shall first take the oaths of allegiance and supremacy, (and abjuration, 1 *G. st.* 2. *c.* 13.) and make and subscribe this declaration following: *viz.*

[159] I *A. B.* do solemnly and sincerely, in the presence of God, profess, testify, and declare, That I do believe that in the sacrament of the Lord's supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof, by any person whatsoever: And that the invocation, or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they

(*c*) A Roman catholic peer is not intitled to frank letters, *Ld. Petre* v. *Ld. Auckland*, 2 Bos. & Pull. 139.

are now used in the church of Rome, are superstitious and idolatrous. And I do solemnly in the presence of God, profess, testify, and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope, or any other person or persons, or power whatsoever, shall dispense with or annul the same, or declare that it was null or void from the beginning. § 2, 3.

Which said oaths and declaration shall be solemnly and publicly made and subscribed betwixt the hours of nine in the morning and four in the afternoon, by every such peer and member of the house of peers at the table in the middle of the house, before he take his place in the house, and whilst a full house of peers is there with their speaker in his place; and by every such member of the house of commons, at the table in the middle of the said house, and whilst a full house of commons is there duly sitting with their speaker in his chair: and the same to be done in either house in such like order or method, as each house is called over respectively. § 4.

And if any peer or member of the house of peers, or member of the house of commons, shall offend against this act; he shall be deemed and adjudged a popish recusant convict, and shall forfeit and suffer as such; and shall be disabled to execute any office or place of profit or trust, civil or military; or to sit or vote in either house of parliament, or to make a proxy in the house of peers; or to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity; [160] or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift; (or to vote at any election for members of parliament, 1 *G. st.* 2. *c.* 13.); and shall forfeit 500*l.* to him who shall sue. • § 6.

And it shall be lawful for the house of peers and house of commons, or either of them respectively, as often as they shall see occasion, to order and cause all or any of the members of their respective houses, openly in their respective houses of parliament, to take the said oaths, and to make and subscribe the said declaration, at such times, and in such manner, as they shall appoint: And if any peer shall, contrary to such order made by their said house, wilfully presume to sit therein, without taking the said oaths and subscribing the said declaration; he shall be disabled

to sit in the said house of peers and give any voice therein, either by proxy or otherwise, during that parliament: And if any member of the house of commons shall, contrary to such order made by their house, wilfully presume to sit therein, without taking the said oaths, and making and subscribing the said declaration; he shall be disabled to sit in the said house of commons, or to give any voice therein, during that parliament. § 7.

And where any member of the house of commons shall be so disabled to sit or vote, his place shall be void; and a writ shall issue for the election of a new member. § 8.

And during the time of taking the said oaths, and making and subscribing the declaration, all proceedings shall cease; and the said oaths, declaration, and subscription, together with a schedule of the names of the persons who shall take and subscribe the same, shall be made and entered in parchment rolls provided by the clerk of the house of lords and the clerk of the house of commons; and none of the peers or members shall pay to such clerk above 12*d.* for such entry: All which rolls the said clerks shall, without fee, shew to any person desiring to look upon the same. § 11.

XXX. *Papists [recusants convict] shall not present to benefices.*

1. By the 3 *J. c.* 5. Every person being a *popish recusant convict, shall be utterly disabled to present* to any benefice with cure or without cure, prebend, or any other ecclesiastical living; or to [161] collate or nominate to any free school, hospital, or donative; *or to grant any avoidance* of any benefice, prebend, or other ecclesiastical living. § 18.

And the chancellors and scholars of the university of *Oxford, so often as any of them shall be void*, shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, in the counties of *Oxford, Kent, Middlesex, Sussex, Surrey, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Caermarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire*, the city of *London*, and in every city and town being a county of itself within any of the limits and precincts of any of the counties aforesaid, as shall happen to be void during such time as the patron thereof shall be a recusant convict as aforesaid. § 19.

And the chancellor and scholars of the university of *Cambridge* shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living,

school, hospital, and donative, within the counties of *Essex*, *Hertfordshire*, *Bedfordshire*, *Cambridgeshire*, *Huntingdonshire*, *Suffolk*, *Norfolk*, *Lincolnshire*, *Rutlandshire*, *Leicestershire*, *Derbyshire*, *Nottinghamshire*, *Shropshire*, *Cheshire*, *Lancashire*, *Yorkshire*, the county of *Durham*, *Northumberland*, *Cumberland*, *Westmoreland*, *Radnorshire*, *Denbighshire*, *Flintshire*, *Carnarvonshire*, *Angleseyshire*, *Merionethshire*, *Glamorganshire*, and in every city and town being a county of itself within the limits and precincts of any of the said counties, as shall happen to be void *during such time as the patron thereof shall be a recusant convict* as aforesaid. § 20.

Provided, that neither of the said chancellors nor scholars of either of the said universities, shall present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any such person as shall then have any other benefice with cure of souls: And if any such presentation or nomination shall be made of any such person so beneficed, the same shall be void. § 21.

Being a popish recusant convict] And this whether he be convicted before the avoidance or after; for the words are general, that the university shall present so often as any such benefices shall be void; and avoidances before conviction are within the same mischief as avoidances after; and it would be a hard construction that general words shall not be extended to remedy all cases which are within equal mischief. *Comyns*, 182. *Gibs.* 771. [162]

Shall be utterly disabled] They were utterly disabled before, by being made excommunicate, in § 2. as was observed by *Finch* solicitor, in the case of *Knight* and *Dauncer*; and therefore of what force soever institution or induction, when given upon such a presentation, may be against *strangers*, there is no doubt but the bishop may refuse to give it, and take the benefit of the lapse, in case no other presents, who hath right, and is capable of presenting. For that the bishop in this case, as in others, hath right to lapse, appears from hence, that the statute intended no more than to put the universities in the place of the patron: all rights which belong to others remaining as they were before. *Gibs.* 771.

To present] Hereby the patron is only disabled to present; and he continues patron as to all other purposes; and therefore he shall confirm the leases of the incumbent. 1 *Haw.* 32.

Or to grant any avoidance] But such person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years *bonâ fide*, and for good consideration. 1 *Haw.* 32.

And the chancellor and scholars] The two clauses which give this benefit to the universities respectively, are private clauses, whereof the judges, without pleading of them, cannot take notice. 10 *Co.* 57.

So often as any of them shall be void] But if an advowson or

avoidance, belonging to such a person, come into the king's hands, by reason of an outlawry, or conviction of recusancy or the like; the king, and not the university, shall present. 1 *Haw.* 32.

During such time as the patron thereof shall be a recusant convict] When the presentation for that turn is vested in the university, although afterwards the recusant conformeth himself, or dieth, yet the university shall present. 10 *Co.* 57.

2. By the 1 *W. c.* 26. *Every person who shall* refuse or neglect to make and subscribe the declaration of the 30 *C.* 2. when the same shall be tendered by two justices of the peace as in the said act is mentioned; or who shall, upon notice given as by the said act, *refuse or forbear* to appear before them for the making and subscribing thereof, and shall thereupon have his name, sirname, and place of abode certified and recorded at the sessions; — every
[163] such person so recorded shall be from henceforth adjudged disabled to make such presentation, collation, nomination, donation, or grant of any avoidance of any benefice, prebend, or ecclesiastical living, as fully as if such person were a popish recusant convict. And the universities shall have the presentation, nomination, collation, and donation, lying in the counties, &c. in 3 *J.* 1. *c.* 5. § 19, 20. appointed, as often as they become void, according to the limitations in that behalf. § 2.

And where any person shall be seised or possessed of any advowson, right of presentation, collation, or nomination to any such ecclesiastical living, free school, or hospital, as aforesaid, in trust for any papist or popish recusant, who shall be convicted or disabled as by the 3 *Ja. c.* 5. or by this act; he shall be disabled to present, nominate, or collate to any such ecclesiastical living, free school, or hospital, or to grant any avoidance thereof, and such presentations, nominations, collations, and grants shall be void; and the universities shall proceed, as if such recusant convict or disabled were seised or possessed thereof. § 3.

And if any trustee, or mortgagee, or grantee of any avoidance shall present, nominate, or collate, or cause to be presented, nominated, or collated, any person to any such ecclesiastical living, free school, or hospital, whereof the trust shall be for any recusant convict or disabled, without giving notice of the avoidance in writing to the vice-chancellor within three months next after the avoidance; he shall forfeit 500*l.* to the respective chancellor and scholars of the university to whom the presentation, nomination, or collation shall belong. § 4.

Provided that the said chancellors and scholars of either university, shall not present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any person as shall then have any other benefice with cure of souls: and if any such pre-

sentment shall be had or made of any such person so beneficed, the same shall be utterly void. § 5.

And if any person so presented or nominated to any benefice with cure, shall be absent from the same above sixty days in any one year; in such case the said benefice shall be void. § 6.

Provided always, that if any such person shall present himself at the sessions for that place where his name was recorded, and shall there in open court make and subscribe the said declaration, and take the oaths (of allegiance and supremacy, 1 *W. c.* 8.), he shall be discharged of the said disability, and be enabled to make such presentment, collation, nomination, donation, and grant, as [164] if this act had not been made. § 7.

§ 2. *Refuse or forbear*] In the case of *Fitzherbert* and the university of *Oxford*, the party was summoned to take the oaths, but refused to attend. Upon which occasion, it was declared by the court, that the justices ought to be present at the time appointed; and if they are not there, it is a good excuse for the party, if the party attends; but there is no necessity that the justices should be present, if the party does not come; it is sufficient if they leave notice at the place, to give them notice if the party comes; and the party himself is obliged to do the first act, namely, to attend at the time and place appointed. *Comyns*, 183.

3. And by the 12 *Ann. st.* 2. *c.* 14. It is further enacted, that every papist or person making profession of the popish religion, and every child of such person not being a protestant under the age of twenty-one years, and every mortgagee, trustee, or person any way intrusted directly or indirectly, mediately or immediately, by or for such papist or person making profession of the popish religion, or such child as aforesaid, whether such trust be declared by writing or not, shall be disabled to present, collate, and nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or ecclesiastical living; and every such presentment, collation, nomination, and grant, and every admission, institution, and induction thereupon shall be void: and the universities shall have the presentation, nomination, collation, and donation. § 1.

And when any presentation to any benefice or ecclesiastical living shall be brought to any archbishop, bishop, or other ordinary, from any person who shall be reputed to be, or whom such archbishop, bishop, or other ordinary shall have cause to suspect to be a papist or trustee of any person making profession of the popish religion, or suspected to be such; such archbishop, bishop, or other ordinary, shall tender or administer to every such person (if present) the declaration against transubstantiation of the 25 *C.* 2., and if absent shall by notice in writing to be left at the place of habitation of such person, appoint some convenient time and

place when and where such person shall appear before such archbishop, bishop, or other ordinary, or some persons to be authorized by them by commission under their seal of office; who [165] shall, upon such appearance, tender or administer the said declaration to the party making such presentation: and if he shall neglect or refuse to make and subscribe the declaration so tendered, or shall neglect or refuse to appear upon such notice, such presentation shall be void; and in such case the archbishop, bishop, or other ordinary shall within ten days after such neglect or refusal, send and give a certificate under their seal of office of such neglect or refusal to the vice-chancellor; and the presentation to such benefice, for that turn only, shall be vested in the respective chancellor and scholars. § 2.

And for the better discovery of secret trusts and fraudulent conveyances made by papists, it is enacted, that when the presentation of any person presented to any benefice or ecclesiastical living shall be brought to any archbishop, bishop, or other ordinary; he shall, before he give institution, examine the person presented upon oath, whether, to the best and utmost of his knowledge and belief, the person who made such presentation be the true and real patron, or made the same in his own right, or whether he be not mediately or immediately, directly or indirectly, trustee or any way intrusted for some other, and whom by name, who is a papist or maketh profession of the popish religion, or the children of such, or for any other and whom, or what he knows, has heard, or believes touching the same; and if such person so presented shall refuse to be examined, or shall not answer directly, the presentation shall be void. § 3.

And the chancellors and scholars of the respective universities, to whom the presentation to such benefices and ecclesiastical livings shall belong in case the rightful patrons had been popish recusants convict, and their presentees or clerks, may for the better discovery of such secret and fraudulent trusts, exhibit their bill in any court of equity, against such person presenting, and such person as they have reason to believe to be the *cestui que* trust of the advowson, or any other person who they have cause to suspect may be able to make any other or further discovery of such secret trust and practices; to which bill, the defendants being duly served with process of the court, shall forthwith directly answer: and if they shall refuse or neglect to answer, in such time as shall be appointed by the court, the bill shall be taken *pro confesso*, and be allowed as evidence against such person so neglecting and refusing, and his trustees, and his or their [166] clerk; provided, that every person having fully answered such bill, and not knowing of any such trust, shall be intitled to his costs, to be taxed according to the course of the court. § 4.

And the court where any *quare impedit* shall be depending, at the instance of the said chancellor and scholars or their clerk being plaintiffs or defendants in such suit by motion in open court, may make a rule or order requiring satisfaction upon the oath of such patron and his clerk, who in the said suit shall contest the right of the university to present, by examination of them in open court, or by commission under the seal of such court for the examination of them, or by affidavit as the said court shall find most proper, in order to the discovery of any secret trust, frauds or practices relating to the said presentation; and if it appear to the court, upon the examination of such patron or clerk, that the said patron is but a trustee, then they shall discover who the person is, and where he lives; and upon their refusal to make such discovery, or to give satisfaction as aforesaid, they shall be punished as guilty of a contempt of the court: And if the said patron or his clerk shall discover the person for whom the said patron is a trustee; then the court, on motion made in open court, shall make a rule or order, that the person for whom the patron is a trustee shall in the said court, or before commissioners to be appointed for that purpose under the seal of the said court, make and subscribe the declaration against transubstantiation of the *25 C. 2.*, and likewise, on pain of incurring a contempt of the said court, shall give such further satisfaction upon oath relating to the said trust, as the court shall think fit: and such person so required to make and subscribe the said declaration, and refusing or neglecting so to do, shall be esteemed as a popish recusant convict in respect of such presentation. § 5.

And the answer of such patron and the person for whom he is intrusted, and his and their clerk or any of them, and their examinations and affidavits taken as aforesaid by order of any court where such *quare impedit* shall be depending, or by any archbishop, bishop, or other ordinary, or the commissioners as aforesaid (which examinations shall therefore be reduced into writing, and signed by the party examined), shall be allowed as evidence against such patron so presenting and his clerk. § 6.

Provided, that no such bill, nor any discovery to be made by any answer thereunto, or to any such examination as aforesaid, shall be made use of to subject any person making such discovery or not answering such bill, to any penalty or forfeiture, other than the loss of the presentation then in question. § 7. [167]

And in case of any such bill of discovery exhibited by the chancellor and scholars or their presentee, no lapse shall incur, nor plenarty be a bar against them, in respect of the benefice or ecclesiastical living, touching which such bill shall be exhibited, till after three months from the time that the answer to such bill shall be put in, or the same be taken *pro confesso*, or the prose-

cution thereof deserted; provided that such bill be exhibited before any lapse incurred. § 8.

And the chancellor and scholars may sue a writ of *quare impedit* by the name of chancellor and scholars, or by their proper names of incorporation, at their election. § 9.

And in case of any such trust confessed or discovered by any answer to such bill or such examination as aforesaid, the court may inforce the producing of the deeds relating to the said trusts, by such methods as they shall find proper. § 10.

4. And by the 11 *G.* 2. *c.* 17. It is further enacted, that every *grant* to be made of any advowson or right of presentation, collation, nomination or donation of and to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, and every grant of any avoidance thereof, by any papist or person making profession of the popish religion, whether such trust be declared by writing or not, shall be null and void, unless such grant be made *bonâ fide*, and for a full and valuable consideration, to and for a protestant purchaser, and merely and only for the benefit of a protestant; and every such grantee or person claiming under any such grant, shall be deemed to be a trustee for a papist or person professing the popish religion within the aforesaid act of 12 *Ann.*; and all such grantees, and persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and by such methods, as by the said act. And every *devise* to be made by any papist or person professing the popish religion, of any such advowson or right of presentation, collation, nomination, or donation or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void; and all such devises, and persons claiming under such devises, and
[168] their presentees, shall in like manner be compelled to discover, whether, to the best of their knowledge and belief, such devises were not made to the said intent. § 5.

XXXI. *Shall be as excommunicated.*

1. By the 3 *J. c.* 5. Every *popish recusant convict* shall stand and be reputed to all intents and purposes disabled, as a person lawfully and duly excommunicated, and as if he had been so denounced and excommunicated according to the laws of this realm, until he shall conform himself, and come to church and hear divine service, and receive the sacrament according to the laws of this realm, and take the oaths (of allegiance and supremacy, 1 *W. c.* 8.); and every person sued by such person so to be disabled, may plead the same in disabling of such plaintiff, as if he were so excommunicated by sentence in the ecclesiastical court. § 11.

2. And by the 3 *J. c.* 4. Upon any lawful writ, warrant, or process awarded to any sheriff or other officer, for the taking of any popish recusant (actually) excommunicated for such recusancy; it shall be lawful for such sheriff or other officer, if need be, to break open any house wherein such person excommunicate shall be, or to raise the power of the county, for the apprehending of such person, and the better execution of such warrant, writ, or process. 35.

XXXII. *Shall not repair to court.*

1. By the 3 *J. c.* 5. No popish *recusant convict* shall come into the court or house where the king or his heir apparent to the crown shall be, unless he be commanded so to do by the king, or by warrant from the lords and others of the privy council, on pain of 100*l.*, half to the king, and half to him that shall sue in any of his majesty's courts of record. § 2.

2. And by the 30 *C.* 2. *st.* 2. *c.* 1. Every peer of this realm, and member of the house of peers, and every peer of Scotland or Ireland, being of the age of one and twenty years or upwards, not having taken the oaths (of allegiance and supremacy, 1 *W. c.* 8.) and made and subscribed the declaration against popery of the 30 *C.* 2. *st.* 2. *c.* 1., and every member of the house of commons not having taken the said oaths and made and subscribed the said declaration, and every person convicted of popish recusancy, [169] who shall come advisedly into or remain in the presence of the king, or shall come into the court or house where he resides, shall suffer all the pains, forfeitures, and disabilities of this act; unless he do in the next term after such his coming or remaining take the said oaths, and make and subscribe the said declaration, in the high court of chancery, between the hours of nine and twelve in the forenoon: *That is to say,* he shall be disabled to execute any office or place of profit or trust, civil or military; or to sit or vote in either house of parliament, or to make a proxy in the house of peers; or to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity; or to be guardian of any child, or executor, or administrator of any person, or capable of any legacy or deed of gift; and shall forfeit 500*l.* to him who shall sue. § 5, 6.

But this act shall not extend to the prejudice of any person for coming into or remaining in the presence of the king, who shall first have licence so to do by warrant under the hands and seals of six privy counsellors, by order of his majesty's privy council, upon some urgent occasion therein to be expressed; so as such licence exceed not ten days, and that it be first filed and put upon record in the office of the petty bag in chancery, for any one to

view without fee: and no person to be licensed above thirty days in any one year. § 12.

Provided, that if any offender shall after such offence take the oaths and subscribe the declaration in the chancery in manner aforesaid; he shall from thenceforth be freed and discharged from all seizures, penalties, and losses which he might otherwise sustain by reason of being a popish recusant convict by virtue of this act, and from all disabilities and incapacities incurred thereby; so as such freedom and discharge extend not to restore any such person to any office or place filled up, nor to any other office till after a year from taking the said oaths and making the said declaration; nor to make void the said forfeiture of 500*l*. § 13.

[But by the 31 *G.* 3. *c.* 32. § 20. This penalty of the 30 *C.* 2. *c.* 1. is repealed as to peers, or members of the house of peers of Great Britain or Ireland, professing the Roman catholic religion, who shall take and subscribe the oath prescribed by that act.]

[170] XXXIII. *Shall not come within ten miles of London.*

1. By the 3 *J. c.* 5. All popish recusants who shall come, dwell, or remain within the city of London, or within ten miles thereof, who shall be indicted or convicted of recusancy, or who shall not repair unto some usual church or chapel, and there hear divine service, but shall forbear the same by the space of three months, shall within ten days after such indictment or conviction depart from the said city and ten miles compass of the same, and also shall deliver up their names to the lord mayor, if such recusant be within the city or the liberties thereof; and if the said recusant shall dwell or remain in any other county within ten miles of the said city, then he shall within the said ten days deliver up his name to the next justice of the peace within such county, on pain of forfeiting to the king 100*l*.; half of which shall be to the king, and half to him that will sue in any of the king's courts of record. § 4.

2. And by the 1 *W. c.* 9. For the better discovering and removing all papists and reputed papists out of London and Westminster and ten miles of the same; the lord mayor, and every justice of the peace of London, Westminster, and Southwark, and of the counties of Middlesex, Surrey, Kent, (and Essex, 1 *W. c.* 17.) shall cause to be arrested and brought before him every person, not being a merchant foreigner, as is reputed to be a papist, and tender to him the declaration of the 30 *C.* 2. *st.* 2. *c.* 1., and if he refuse to make and subscribe the same, and shall after such refusal continue within the said distance, he shall forfeit and suffer as a popish recusant convict. § 2.

And every justice of the peace shall certify every such subscription before him taken, and also the names of all persons re-

fusing upon tender to make or subscribe as aforesaid, under his hand and seal, into the court of king's bench the next term, or else at the next quarter sessions of the county or place where such taking, subscribing, or refusal shall happen: And if the said person, so refusing and certified, shall not within the next term or sessions after such refusal appear in the court of king's bench or sessions where such certificate shall be returned, and in open court make and subscribe the same, and indorse or enter his so doing upon the certificate so returned; he shall be from the time [171] of such his neglect or refusal taken and adjudged a popish recusant convict, and as such to forfeit and be proceded against. § 3.

But this act not to extend to any foreigner being a menial servant to any ambassador or public agent. § 4.

[But by 31 *G.* 3. *c.* 32. § 19. The act of 1 *W.* *c.* 9. shall not extend to any person professing the Roman catholic religion who shall take and subscribe the oath of allegiance, abjuration, and declaration therein before appointed to be taken and subscribed; for which see Oaths, 20. B. and *infra* XLVI.]

XXXIV. *Shall not remove above five miles from their habitation.*

1. By the 35 *El.* *c.* 2. Every person above the age of sixteen and having any certain place of abode, who being a *popish recusant shall be convicted* for not repairing to church, (vid. *supra* XV.) and being within this realm at the time he shall be convicted, shall within forty days next after such conviction (if not restrained by imprisonment, or by the king's command, or by order of six or more of the privy council, or by sickness, and in case of such restraint, then within twenty days after the removal of such restraint,) repair to his place of usual dwelling and abode, and shall not at any time after remove above five miles from thence; on pain of forfeiting his goods, and also of forfeiting to the king all his lands, rents, and annuities during life. § 3.

And every such offender which hath copyhold or customary lands, shall forfeit the same during his life to the lord of the manor, if such lord be not a popish recusant, convict; and if he be, then such forfeiture shall be to the king. § 5.

And all such persons as are to repair to their place of dwelling and abode, and not to remove *above five miles* from thence as is aforesaid, shall within twenty days next after coming to such place notify their coming thither, and present themselves and deliver their true names in writing, to the minister or curate of the parish and to a constable of the town; and thereupon the said minister or curate shall enter the same in a book to be kept in every parish for that purpose. § 6.

And the said minister or curate and the said constable shall

certify the same in writing to the next general or quarter sessions, to be entered by the clerk of the peace in the rolls of the sessions. § 7.

[172] And if any such person, being a popish recusant, (not being a feme covert, and not having lands of the clear yearly value of twenty marks, or goods above the value of 40*l.*) shall not within the time before limited repair to his place of usual dwelling and abode, and thereupon notify his coming as aforesaid; or at any time after his repairing to any such place, shall pass or remove above five miles from thence; and shall not within three months next after he shall be apprehended for offending as aforesaid, conform himself in coming to church, and in making such public confession and submission as is hereinafter directed, being thereunto required by the bishop of the diocese, or a justice of the peace, or by the minister or curate of the parish; in every such case, every such offender, being thereunto warned or required by two justices of the peace or the coroner, shall upon his corporal oath before two justices of the peace or a coroner, abjure the realm for ever; and thereupon shall depart out of this realm at such haven and port, and within such time, as shall be assigned and appointed by the said justices or coroner, unless he be letted or stayed by such lawful and reasonable means or causes, as by the common laws of this realm are permitted and allowed *in cases of abjuration for felony;* and in such cases of lett or stay, then within such reasonable and convenient time after, as the common law requireth, in case of abjuration for felony. § 8.

And every justice of the peace or coroner before whom such abjuration shall be made, shall cause the same presently to be entered of record before them, and certify the same to the next assizes. § 9.

And if such offender shall refuse to make such abjuration, or after abjuration made shall not go to such haven and within such time as is before appointed, and from thence depart out of this realm, or after such departure shall return without the king's special license; he shall be guilty of felony without benefit of clergy. § 10.

Provided, that if any person so restrained shall be urged by process, or be bound without fraud or covin to make appearance in any of the king's courts; or shall be required by three or more of the privy council, or by four or more of any commissioners to [173] be in that behalf assigned by the king to make appearance before such council or commissioners; in such case he shall incur no forfeiture for travelling to make appearance accordingly, nor for his abode concerning the same, nor for convenient time for his return. § 13.

And if any such person so restrained shall be bound or ought to yield his body to the sheriff, upon proclamation in that behalf without fraud or covin to be made; in such case he shall not

incur any forfeiture for travelling for that purpose only, nor for convenient time for his return. § 14.

Provided also, that if any person that shall offend against this act, shall before he be thereof convicted, come to some parish church on some Sunday or other festival day, and there hear divine service, and at service time, before the sermon, or reading of the gospel, make public and open submission and declaration of his conformity; he shall be discharged. Which submission shall be as followeth: I *A. B.* do humbly confess and acknowledge, that I have grievously offended God in contemning her majesty's good and lawful government and authority, by absenting myself from church, and from hearing divine service, contrary to the godly laws and statutes of this realm: And I am heartily sorry for the same, and do acknowledge and testify in my conscience, that the bishop or see of Rome hath not nor ought to have any power or authority over her majesty, or within any her majesty's realms or dominions: And I do promise and protest, without any dissimulation, or any colour or means of any dispensation, that from henceforth I will from time to time obey and perform her majesty's laws and statutes, in repairing to the church, and hearing divine service, and do my uttermost endeavour to maintain and defend the same. § 15, 16.

And the minister or curate shall presently enter the same into a book to be kept in every parish for that purpose; and within ten days shall certify the same in writing to the bishop. § 17.

And if any person shall relapse after his submission, he shall have no benefit by such his submission. § 18.

And married women shall also be bound by this act, except only in the case of abjuration. § 19.

Above five miles] It seems that the miles shall be computed according to the English manner, allowing 1760 yards to each mile; and that the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most [174] usual way. 1 *Haw.* 25.

In cases of abjuration for felony] Anciently, if a man had committed felony, and did fly to a sanctuary, that is, to a church or church-yard before he was apprehended, he might not be taken from thence to be tried for his crime; but on confession thereof before the justices, or before the coroner, he was admitted to abjure the realm: but afterwards this privilege of *sanctuary*, by the 21 *J. c.* 28. was taken away. But the *abjuration*, where it is by statute specially appointed, as in the present case, doth still continue. (9)

Abjuration] The form whereof, according to the ancient books, is thus: " This hear you, Sir Coroner, that I *A. O.* of

(9) See 4 *Bla. Comm.* 332.

"——, in the county of ——, am a popish recusant, and in "contempt of the laws and statutes of England, I have and do "refuse to come to their church: I do therefore, according to "the intent and meaning of the statute made in the 35th year "of queen Elizabeth, abjure the realm of England. And I shall "haste me towards the port of P. which you have given and "assigned to me, and that I shall not go out of the highway "leading thither, nor return back again; and if I do, I will that "I be taken as a felon of the king: And that at P. I will dili-"gently seek for passage, and I will tarry there but one flood "and ebb, if I can have passage; and unless I can have it in "such space, I will go every day into the sea up to my knees, "assaying to pass over. So help me God and his doom." *Stam.* 116. *Mir. b.* 1. *Offic. Cor.* 49.

2. And by the 3 *J. c.* 5. § 7. The king, or three of the privy council in writing under their hands, may give license to every such recusant to go and travel out of the compass of five miles, for such time as in the said license shall be contained, for their travelling, attending, and returning, and without any other cause to be expressed within the said license: And if any person so confined, shall have necessary occasion or business to go and travel out of the compass of the said five miles, then upon license in writing in that behalf to be gotten, under the hands and seals of four justices of the peace of the same county, division, or place, next adjoining to the place of abode of such recusant, with the privity and assent in writing of the bishop of the diocese, or of the lieutenant or a deputy-lieutenant of the county residing within the said county or liberty, under their hands and seals (in which license shall be specified both the particular cause of the license
[175] and the time how long the party shall be absent in travelling, attending, and returning): it shall be lawful for such person to go and travel about such his necessary business, for such time only as shall be comprised in the said license, the party so licensed first making oath before the said four justices or any of them, that he hath truly informed them of the cause of his journey, and that he shall not make any causeless stays. And every person so confined, who shall go above five miles from the place to which he is confined, not having such license, and not having taken such oath, shall suffer as by the 35 *El. c.* 2.

E. 11. *J.* Peter Maxfield was indicted, that he being a convicted recusant, departed above five miles from his abode in Walstood in the county of Stafford, contrary to the statute. The defendant pleaded, that he informed Ralph Snead, Walter Bagnal, and two other justices of the peace of the county of Stafford (the said Walter being also a deputy-lieutenant there), that he had urgent occasions to go to London, about business concerning his estate, and made oath before them that it was true; whereupon they by

writing under their seals, gave license unto him to go to London, or to other places, as his business required, for six months; by virtue whereof he went; and so justifies. And it was thereupon demurred: 1. Because the statute is, that four justices, with the assent of a lieutenant in writing, or one deputy-lieutenant in writing, may give license; for it ought to be by four justices besides the deputy-lieutenant: And all the court were of that opinion; for the statute appointing precisely the number of the justices, with the assent as aforesaid, it ought to be exactly pursued: and it is not sufficient, that a deputy-lieutenant be one of the four. 2. The license is not good, because it is not pleaded to be under their hands: and it is not sufficient to plead it to be under their seals: Also the license ought to shew the particular cause of the license, and not in such general manner, for urgent causes. Wherefore rule was given, that if cause were not shewn, judgment should be entered for the king. *Cro. Jac.* 352.

XXXV. *Shall be disabled as to law, physic, and offices.*

By the 3 *J. c.* 5. No *recusant convict* shall practise the common law of this realm as a counsellor, clerk, attorney, or solicitor, nor shall practise the civil law as advocate or proctor; nor practise physic, nor exercise the trade of an apothecary; nor shall [176] be judge, minister, clerk, or steward of or in any court, or keep any court, nor shall be register or town clerk, or other minister or officer in any court; nor shall bear any office or charge, as captain, lieutenant, corporal, serjeant, ancient bearer, or other office in camp, troop, band, or company of soldiers; nor shall be captain, master, or governor, or bear any office of charge of or in any ship, castle, or fortress of the king; but shall be utterly disabled for the same: and every person offending herein shall also forfeit 100*l.* half to the king, and half to him that shall sue in any of the king's courts of record. § 8.

And no *popish recusant convict*, or having a wife being a popish recusant convict, shall exercise any public office or charge in the commonwealth; but shall be utterly disabled to exercise the same by himself, or by his deputy: Except such husband himself, and his children, which shall be above the age of nine years, abiding with him, and his servants in household, shall, once a month, not having any reasonable excuse to the contrary, repair to some church or chapel usual for divine service, and there hear divine service: and the said husband, and such his children and servants as are of meet age, receive the sacrament of the Lord's supper, at such times as are limited by the laws of this realm, and do bring up his said children in true religion. § 9.

[The 7 & 8 *W.* 3. *c.* 24. and 1 *G.* 1. *st.* 2. *c.* 13. also imposed certain penalties on persons acting as counsellors at law, barristers,

attorneys, solicitors, clerks, or notaries, before having taken the oaths of allegiance, supremacy, and abjuration, as mentioned in those acts, and subscribed the declaration against transubstantiation of the *25 C.2.*; but the *31 G.3. c.32.* § 22. substitutes in their room the oath and declaration therein contained, (which see Oaths, 20. B.) which are to be taken, subscribed, and registered in the same manner as the former oaths and declaration, for the purpose of enabling persons professing the Roman catholic religion to act in the aforesaid capacities (1); *i. e.* by 9 *G.2. c.26.* § 3. within six months after their admission, at one of the courts at Westminster, or the general or quarter sessions of the place where they reside.]

[177] XXXVI. (A) *Shall not be executors, administrators, or guardians.*

By the 3 *J. c.5.* A *recusant convict* shall be disabled to be executor or administrator by force of any testament or letters of administration; nor shall have the custody of any child as guardian in chivalry, guardian in socage, or guardian in nature of any lands, freehold, or copyhold. § 22.

And the next of kin of such child to whom the lands cannot lawfully descend, who shall usually resort to some church or chapel and there hear divine service, and receive the sacrament thrice in the year next before, shall have the custody and education of such child, and of his lands holden in knights' service, till the full age of the said ward of twenty-one years; and of his lands holden in socage, as a guardian in socage; and of his lands holden by copy of court-roll of any manor, so long as the custom of the said manor shall allow the same: and shall yield an account of the profits of the same to the said ward. § 23.

And if any of the wards of the king or of any other shall be granted or sold to any popish recusant convict, such grant or sale shall be void. § 24.

[XXXVI. (B) *Papists to enjoy lands, must take and subscribe the oath, &c. prescribed by* 18 G.3. c.60. *or* 31 G.3. c.32. § 1.

Papists to enjoy lands must, within six months after the accruing of their title, take and subscribe the oath of the 18 *G.3.*

(1) But where an attorney, a papist, petitioned for leave to take the oath prescribed by 31 *G.3. c.32.* § 22. instead of that of supremacy, on being admitted a master extraordinary in chancery, he was refused, *Exp. Agar.* 1814. 3 *Ves. & B.* 169.

c. 60. for which *vid. infra* XLV. in *note*, or the oath and declaration provided by 31 *G.* 3. *c.* 32. § 1. See *case of Papists*, 1722. 2 *P. Wms.* 3. See 43 *G.* 3. *c.* 30. giving a further option.]

XXXVII. *Inrolling deeds and wills of papists.*

1. By the 3 *G. c.* 18. and 21 *G.* 3. *c.* 51. No manors or lands, or any interest therein, or rent or profit thereout, shall pass, alter, or change from any papist or person professing the popish religion, by any deed or will, except such deed, within six months after date, and such will within six months after the death of the testator, be inrolled in one of the king's courts of record at Westminster, or within the county wherein the manors and lands do lie, by the *custos rotulorum* and two justices of the peace, and the clerk, or deputy-clerk of the peace, or two of them, whereof the clerk of the peace, or his deputy, to be one. [Repealed by 31 *G.* 3. *c.* 32. § 21. *vid. infra* XXXVIII.]

2. But by the 10 *G. c.* 4. Leases of lands made by papists, or [178] persons professing the popish religion, to any protestant, whereon the full yearly value, or the ancient or most accustomed yearly rent, or more shall be reserved, shall be good without inrolling. § 19.

3. And by several temporary acts from time to time, such deeds and wills shall be good, if they be inrolled before a time therein respectively limited.

And no purchase made for full and valuable consideration of any manors, messuages, or lands, or of any interest therein, by any protestant, and merely and only for the benefit of protestants, shall be impeached or avoided by reason that any deed or will through which the title thereto is derived hath not been inrolled; so as no advantage was taken of the want of inrollment thereof before such purchase was made, and so as no decree or judgment hath been obtained for want of the inrollment of such deeds or wills.

Provided, that this shall not extend, to make good any grant, lease, or mortgage of the advowson, or right of presentation, collation, nomination, or donation of and to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or any avoidance thereof, made by any papist or person professing the popish religion, in trust, directly or indirectly, mediately or immediately, by or for any such papist or person professing the popish religion, whether such trust hath been declared by writing or not.

XXXVIII. *Registering estates of papists.*

1. By the 1 *G. st.* 2. *c.* 55. Every person having any estate or

interest in any lands, being a popish recusant or papist, or educated in the popish religion, or whose parent or parents shall be a papist or papists, or who shall use or profess the popish religion, shall, within six months after he shall attain to the age of twenty-one years, take the oaths of the 1 *G. st.* 2. *c.* 13. and repeat and subscribe the declaration against popery of the 30 *C.* 2. in one of the courts at Westminster, or at the sessions of the peace where such lands or some part thereof shall lie, between the hours of nine and twelve in the forenoon; or in default thereof shall, within six months next after the time appointed for him to take the oaths, and so from time to time, within six months after he, or any trustee for him, shall come into the possession or perception of the rents or profits of any other lands,
[179] register, or procure to be registered, his name, and all such lands, in what parish, township, or place the same do lie, and who are the possessors thereof, and what estate or interest he has in the same, and the yearly rent, if the same shall be let; and if the same be let upon lease, then by whom such lease was made, what yearly or other rent is reserved thereupon, and what fine or sum of money was paid for such lease, in case the same was made by himself, or any person in trust for him, or that he was party or privy thereunto; and the time, and day of the month, and year when such entry shall be made,——in a parchment book or roll which shall be kept by the clerk of the peace. § 1.

And every such person shall take care that his name be, within the said six months allowed for making such registry, subscribed to such registry in the presence of two justices in open sessions, either by himself, or by his attorney thereunto lawfully authorized by warrant of attorney under his hand and seal executed by him in the presence of two witnesses, who shall make proof of such execution, upon their oaths, at the sessions where such name shall be subscribed or registry produced; and two justices then present shall subscribe their names to such entry as witnesses that the same was duly made, and in default thereof each of the said justices then present shall forfeit 20*l.* to the king. § 1.

And the clerk of the peace shall keep parchment books or rolls at some notorious place within his division, and shall, by himself or his lawful deputy, enter therein the christian and surnames of every such person who shall come in person and desire to be registered, or shall send any writing under his hand to him or his deputy, desiring him to register his name; and shall also register the estate in lands of every such person, in such manner and in such words as he shall by any writing signed by him desire: Provided, that such person pay the fees hereby appointed for the same, and that he apply to the said clerk of the peace, or his deputy, to enter such registry, and deliver to him in writing the words he desires to have so registered or entered ten days before

the sessions where the entries are to be subscribed. And such
clerk of the peace, or his deputy, shall enter such persons' names,
and registry of their estates, before the next sessions after such
delivery, in the said books or rolls; and shall carry the said books
and rolls in which such entries shall be so made, to the next and
every other sessions of the peace, until the time of such subscrib- [180]
ing shall be expired. And such clerk of the peace shall also
keep alphabetical tables of the surnames of all such persons whose
names and estates shall be registered, and of the parishes and
townships where the lands so registered lie, with reference to the
place in the books or rolls where such names and lands shall be
registered; and shall also carefully keep all such warrants of
attorney as shall be so proved as aforesaid upon a file, together
with such books and rolls; and shall likewise enter such warrants
of attorney upon record; and shall have for such registry and
entry on record 3*d*. for every 200 words which such registry and
entry on record shall contain; and shall have 4*d*. for every search
that shall be made for the name or estate of any person; and
shall make search on the request of any person who shall pay
such fees, and shall permit such person to inspect the said tables,
books, and rolls, and such letters of attorney as shall be so filed;
and shall give copies of such registries subscribed by himself or
his lawful deputy, to every person who shall desire the same, and
tender him the fees hereby appointed for the same; and shall
suffer such persons who shall request him so to do, to examine
the same with the roll or book, and for so doing shall have 3*d*.
for every 200 words contained in every such copy. § 1.

And if any clerk of the peace shall neglect or refuse to do any
the things hereby appointed, he shall forfeit his office. § 1.

And if any such person hereby required to take and subscribe
such oaths, and repeat and subscribe such declaration as afore-
said, or in default thereof to register, or cause to be registered
his name and estate as aforesaid, shall not either take and sub-
scribe such oaths, and repeat and subscribe such declaration in
manner aforesaid, or register his name and estate as aforesaid,
and also subscribe his name to such registry, or procure the
same to be subscribed by such his attorney as aforesaid, within
the time limited for the doing thereof, or shall not register the
same truly; he shall forfeit the fee-simple and inheritance of all
such lands not registered, or fraudulently registered, whereof he
or any person in trust for him was seised in fee-simple at the
time of such default or fraud in registering, and the full value of
the inheritance of all such lands not registered or fraudulently
registered, whereof he or some person in trust for him was not
seised in fee-simple at the time of such default or fraud as afore-
said; two third parts to the king, and the other third part to [181]
such person, being a protestant, who shall sue for the same at

the common law in any of the courts at Westminster, or in the chancery: and the person so suing shall be intitled in the court of chancery to demand all such discoveries as he might do if he were a purchaser for valuable consideration, and to demand a true discovery from all persons of all such incumbrances and titles which any way affect the same, and of all trusts relating thereto; to which bill no plea of demurrer shall be allowed, but the defendant shall sufficiently answer the same at large: and also the person suing for the same may bring an ejectment on his own demise, and give this act and the special matter in evidence; and if it shall appear upon trial of such ejectment, that the estate sued for is the estate of the person so neglecting to register or fraudulently registering, and the defendant shall not make it appear that he took the said oaths, and repeated and subscribed the said declaration in manner aforesaid, or otherwise that he registered his name and the estate so sued for, a verdict shall be given for the lessor of the plaintiff in such ejectment, and judgment shall be thereupon had as is usual upon verdicts in ejectments, and the lessor of the plaintiff shall have costs of suit as is usual when judgment in ejectment is recovered by or given for the lessor of the plaintiff; and by such judgment two third parts of the lands so recovered shall be vested in the king, and the other third part in the person who shall be lessor of the plaintiff in the said ejectment. § 1.

But in case such person so making default or committing any fraud in registering as aforesaid, after such default or fraud committed, and before he be convicted or any ejectment or suit brought for such forfeited lands, shall *bonâ fide* for a just and valuable consideration, convey over, grant, lease, or incumber any such lands omitted or fraudulently registered as aforesaid; the person so purchasing or having such grant, lease, or incumbrance, not knowing at the time of such purchase or incumbrance made, the said offender to be a person within the description of this act, shall not be prejudiced hereby, but in such case the offender shall forfeit the value of the inheritance to be distributed and recovered in manner aforesaid. § 3.

Also this shall not extend to compel any person to register or procure to be registered any lands, until he or some other person as trustee for him hath been actually seised, and have notice
[182] thereof, or possessed, or in the receipt of the rents or profits of the same for six months. § 4.

And this shall not extend to compel any person to register any lands, whereof he shall be only farmer or tenant at rack rent, or only shall hold by lease, whereupon two thirds of the full yearly value or more shall be reserved. § 5.

Also this shall not extend to defeat or prejudice any protestant, or other creditor, who *bonâ fide* shall have any charge or in-

cumbrance upon any real estate hereby directed to be registered; but then in case of such charge or incumbrance, the person so making default, or committing any fraud in registering as aforesaid, shall forfeit the value of such charge and incumbrance, one third to him who shall by virtue of this act sue for and recover the lands so forfeited, subject to such charge and incumbrance, or any part thereof, in proportion to the part so by him recovered, and two thirds to the king. § 6.

2. And by the 3 *G. c.* 18. No action for any penalty or forfeiture on this or the former act, for wilfully neglecting or refusing to register, or for committing fraud in such registry, shall be commenced after two years after the offence committed. § 2.

And where any manors, demesne, or other lands, or entire farms, do lie in more countries than one, the registering thereof, in the county only where the manor house or the house to the said farm or lands do lie, and not in several counties, taking notice thereof in the said registry, that the same do extend to such other county,——shall be a sufficient registering of such entire manors, farms, or lands. § 3.

And no sale for a full and valuable consideration of any manors, messuages, or lands, or of any interest therein, by any person being reputed owner, or in the possession or receipt of the rents and profits thereof, made to and for any protestant purchaser, and merely and only for the benefit of protestants, shall be avoided or impeached by reason of any of the disabilities or incapacities in the 11 & 12 *W. c.*4. or 1 *J. c.*4. or other acts contained, and incurred by any person joining in such sale, or [183]
by any other person from or through whom the title or any interest therein shall be derived; unless before such sale, the person intitled to take advantage of such disability or incapacity shall have recovered the said manors, messuages, or lands, or give notice of his claim and title to such purchaser: or, before the contract for such sale, shall have claimed the said manors, messuages, or lands, by reason of such disability or incapacity, and have entered such claim in open court at the general sessions of the peace where the same do lie, and *bonâ fide* and with due diligence pursued his remedy in a proper course of justice for the recovery thereof. § 4.

[But the 31 *G.*3. *c.* 32. § 21. reciting the 1 *G.*1. *st.*2. *c.* 55. and 3 *G.*1. *c.*18. And that by other subsequent acts no manors, lands, or any interest therein, or rent or profit thereout, shall pass, alter, or change from any papist or person professing the popish religion by any deed or will, except such deed within six months after the date, and such will within six months after the death of the testator be inrolled in one of the king's courts of record at Westminster, or within the county wherein the manors or lands do lie: enacts, *That the said two last-recited acts passed in the first and third years of the reign of his said majesty king*

George the first, and also such parts of all other acts as require the registry of the names and estates of persons being papists or professing the popish religion, or being reputed to be such, shall be and the same are hereby utterly repealed, abrogated, and made void; and from and after the 24th day of June 1791, no person whatsoever shall be prosecuted, sued, molested, or otherwise affected by reason of not having complied with or conformed to the said hereby repealed acts and parts of acts, or any of them; and all deeds and wills shall from and after the said 24th day of June 1791 be as good and effectual both at law and in equity, and to and for all intents and purposes whatsoever, as if the said hereby repealed acts and parts of acts had never been made. And by the 35 *G.* 3. *c.* 99. deeds and wills of papists made since the 29th of September 1717 are good in law if inrolled before the first of September 1795, provided they shall not have been questioned before the first of January 1795; and purchases made are not to be avoided on account of the title deeds not having been inrolled. But the act is not to make good any grant of the right of presentation to any benefice, in trust for a papist.]

XXXIX. *Papists to pay double taxes.*

By the yearly land-tax acts, papists and reputed papists, being of eighteen years of age, who shall not have taken the oaths of
[184] allegiance and supremacy, shall pay double land-tax. [But on the motion of Sir *John Mitford*, Sol. Gen. who originally brought in the 31 *G.* 3. *c.* 32. this clause was omitted in the land-tax act of 1794. *Feb.* 4. 1794.]

XL. *Lands given to superstitious uses.*

By the 1 *G. st.* 2. *c.* 50. All manors, lands, tenements, rents, tithes, pensions, portions, annuities, and all other hereditaments whatsoever, and all mortgages, securities, sums of money, goods, chattels, and estates, which have been given, granted, devised, bequeathed, or settled upon trust, or to the intent that the same, or the profits or proceed thereof shall be applied to any abbey, priory, convent, nunnery, college of jesuits, seminary, or school for the education of youth in the Romish religion in Great Britain or elsewhere, or to any other popish or superstitious uses,—shall be forfeited to the king for the use of the public. § 24. *Exp.* This act was passed on account of the rebellion in the year 1715, and commissioners were appointed to inquire of the estates, &c. [Nothing in this act shall make it lawful to found, endow, or establish any religious order or society of persons bound by monastic or religious vows, or any school, academy, or college by persons professing the Roman catholic religion within these realms, or the dominions thereunto belonging, and all

uses, trusts, and dispositions of real or personal property which before 24. *June* 1791, were deemed superstitious or unlawful, shall continue to be so deemed. 31 *G.* 3. *c.* 32. § 17.]

XLI. *Presentment of papists to the courts spiritual and temporal.*

1. *Can.* 110. If the churchwardens or questmen or assistants shall know any man within their parish or elsewhere, that is a fautor of any usurped or foreign power by the laws of this realm, justly rejected and taken away, or a defender of popish and erroneous doctrines; they shall detect and present the same to the bishop of the diocese or ordinary of the place to be censured and punished according to such ecclesiastical laws as are prescribed in that behalf.

2. *Can.* 114. Every parson, vicar, or curate shall carefully inform themselves every year, how many popish recusants, men, women, and children, above the age of thirteen years, and how many being popishly given (who though they come to the church, yet do refuse to receive the communion) are inhabitants, or make their abode either as sojourners or common guests in any of their several parishes, and shall set down their true names in writing (if they can learn them), or otherwise such names as for the time they carry, distinguishing the absolute recusants from half recusants; and the same so far as they know or believe, so distinguished and set down under their hands, shall truly present to their ordinaries, under pain of suspension, before the feast of [185]
St. John Baptist. And all such ordinaries, chancellors, commissaries, archdeacons, officials, and all other ecclesiastical officers to whom the said presentments shall be exhibited, shall likewise within one month after the receipt of the same, under pain of suspension by the bishop from the execution of their offices for the space of half a year (as often as they shall offend therein), deliver them or cause to be delivered to the bishop respectively; who shall also exhibit them to the archbishop within six weeks; and the archbishop to his majesty within other six weeks after he hath received the said presentments.

3. And by the statute of the 3 *J. c.* 4. The churchwardens and constables of every town, parish, or chapel, or one of them, or if there be none such, then the chief constable of the hundred where such town, parish, or chapel shall be, as well in places exempt as not exempt, shall once a year present the monthly absence from church of all popish recusants; and shall present the names of their children being of the age of nine years and upwards, abiding with their parents, and as near as they can the age of every of the said children; as all the names of the servants of such recusants; — at the general quarter sessions. § 4.

Which presentments shall be recorded by the clerk of the peace, or town clerk without fee. And in default of such presentment to be made, the churchwardens, constables, or high constables shall forfeit 20*s.*; and in default of such recording, the clerk of the peace or town clerk shall forfeit 40*s.*: To be recovered in the king's bench, assizes, or sessions. § 5. 36.

And upon every presentment of such monthly absence, whereupon the party shall after be indicted and convicted (not being for the same absence before presented) the churchwardens, constables, or high constables making such presentment, shall have a reward of 40*s.* to be levied out of the recusant's goods and estate in such manner and form as the justices shall by their warrant then and there order and appoint. § 6. [But by the 31 *G.* 3. *c.* 32. § 18. No person who shall take the oaths and subscribe the declaration therein prescribed shall be prosecuted for being a papist, or not coming to church. Vid. *supra* X. and XV.]

[186] XLII. *Information against papists not restrained to the proper county.*

The act of the 21 *J. c.* 4. for laying informations in the proper county, shall not extend to any information, suit or action grounded upon any law or statute made against popish recusants, or against those that shall not frequent the church and hear divine service; but such offence may be laid or alleged to be in any county at the pleasure of the informer, any thing in the said act to the contrary notwithstanding. § 5.

XLIII. *Peers how to be tried in cases of recusancy.*

It is generally provided in the several acts, that peers, in cases of recusancy, shall be tried by their peers.

XLIV. *Papists conforming.*

1. By the 1 *J. c.* 4. If any recusant shall submit or reform himself, and become obedient to the laws of the church, and repair to church, and continue there during the time of divine service and sermons; he shall be discharged. § 2.

2. By the 3 *J. c.* 4. Every popish recusant convict, who shall conform himself and repair to church, shall within the first year after he shall so conform himself, and after the said first year shall once in every year following at the least, receive the sacrament of the Lord's supper, in the church of the parish where he shall most usually abide. § 2.

And if there be no such parish church, then in the church

next adjoining: on pain that for such not receiving he shall forfeit for the first year 20*l.*, for the second year 40*l.*, and for every year after 60*l.*, until he shall have received the sacrament, as aforesaid: And if after he shall have received the sacrament, he shall eftsoons at any time offend in not receiving the same by the space of one year, he shall for every such offence forfeit 60*l.* The one half of all which forfeitures shall be to the king, and the other half to him that will sue in any court of record at Westminster, or at the assizes, or general quarter sessions. § 3.

3. And by the 11 *G.* 2. *c.* 17. Every person being reputed owner, or in possession or receipt of the rents and profits of any manors, messuages, or lands, or of any interest therein, who having been, or reputed to be a papist, or educated in the popish religion, shall conform to and profess the protestant religion, and shall take the oaths of allegiance, supremacy, and abjuration, and repeat and subscribe the declaration of the 30 *C.* 2. in the court of chancery, king's bench, or quarter sessions of the county where he shall reside (all which shall be recorded in one of his majesty's courts of record at Westminster or such quarter sessions as aforesaid); and every person being a protestant, claiming under such person so conforming, for his own benefit or for the benefit of any other protestant, and not for the benefit of any papist, — shall hold, possess, and enjoy all such manors, messuages, and lands discharged from all disabilities and incapacities incurred by such person so reputed owner, or in possession or receipt of the rents and profits as aforesaid, or by any other person by, from, or through whom the title to such manors, messuages, or lands, or any interest therein shall be derived, for such estate or interest as he would have had if no such disability or incapacity had been incurred; unless the person entitled to take advantage of such disability, incapacity, or defect of title shall *bonâ fide* recover such manors, messuages, or lands, by judgment or decree in some action or suit to be commenced six calendar months before the making of such record, and to be prosecuted with due diligence. § 1. [187]

But this shall not prejudice the right of any person entitled to take advantage of such disability or incapacity, who shall have, precedent to the making of such record, been in quiet possession of any such manors, messuages, or lands by the space of two calendar months. § 2.

And if any such person so conforming shall afterwards return to, or again profess the popish religion, he shall for ever afterwards be disabled and incapable of having any benefit of this act, and shall from thenceforth be liable to the same disabilities, incapacities, and forfeitures, as if he had not taken the said oaths, and subscribed the declaration. § 3.

Also, this shall not extend to prejudice the right of any person

intitled to any remainder or reversion in any such manors, messuages, or lands, in case he shall pursue his right by some action or suit to be commenced within twelve calendar months next after the precedent estate on which such remainder or reversion
[188] depends and is expectant shall be determined, and shall prosecute such action or suit with due diligence. § 4.

[But by the 31 *G.*3. *c.*32. Papists who shall take the oaths and subscribe the declarations therein contained are not liable to be prosecuted for not resorting to some parish church, &c. or for being papists or reputed papists, § 4.; Nor shall they be summoned to subscribe the declaration against transubstantiation, § 18.; or to register their estates, § 21.; and they are in general relieved from those penalties which by the above mentioned statutes are remitted to those who shall conform.]

In the year 1714, the convocation drew up a form of receiving converts from popery: which is printed in *Wilk. Conc.* V. 4. p. 660.

XLV. *Saving of the ecclesiastical jurisdiction.*

It is generally provided by the several principal statutes above rehearsed, that nothing therein shall take away or abridge the authority or jurisdiction of ecclesiastical censures; but the archbishops, bishops, and other ecclesiastical judges may proceed as before the making thereof. [But the 31 *G.*3. *c.* 32. § 3 & 4. limits equally (in the cases mentioned in that act) the civil and ecclesiastical jurisdictions.]

Note, By the 11 *&* 12 *W.* *c.*4. further penalties were enacted against papists, which were as follows: (1) If any person shall apprehend any popish bishop, priest, or jesuit, and prosecute him, till he be convicted of saying mass, or exercising any other part of the office or function of a popish bishop or priest; he shall receive from the sheriff 100*l.* reward. (2) If any popish bishop, priest, or jesuit, shall say mass, or exercise any other part of the office or function of a popish bishop or priest (except in foreign ministers' houses); or if any papist, or person making profession of the popish religion, shall keep school, or take upon himself the education or government or boarding of youth; he shall be adjudged to perpetual imprisonment. (3) If any person educated in the popish religion, or professing the same, shall not within six months after he shall be 18 years of age, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30 *C.* 2. in the chancery, king's bench, or quarter sessions; he shall (in respect of himself, but not of his heirs) be incapable to inherit or take any lands, by descent, devise, or limitation:
[189] but the next of kin, being a protestant, shall have the same. (4) Every papist, or person making profession of the popish

religion, shall be disabled to purchase any lands, or profits out of the same, in his own name, or in the name of any other to his use, or in trust for him; but the same shall be void. (*d*) —— But by the 18 *G.* 3. *c.* 60. all these clauses are repealed; provided that nothing in the same act of 18 *G.* 3. shall extend to any person but such who shall within six calendar months after passing of the act, or of accruing of his title, being of the age of 21 years, or being of unsound mind, or in prison, or beyond the seas, then within six months after such disability removed, take and subscribe an oath in the words following:

I A. B. do sincerely promise and swear, That I will be faithful and bear true allegiance to his majesty king George *the third, and him will defend, to the utmost of my power, against all conspiracies and attempts whatever that shall be made against his person, crown, or dignity. And I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them. And I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown in his majesty's family against any person or persons whatsoever; hereby utterly renouncing and abjuring any obedience or allegiance unto the person taking upon himself the stile and title of* Prince of Wales, *in the life-time of his father, and who, since his death, is said to have assumed the stile and title of king of* Great Britain, *by the name of* Charles *the third, and to any other person claiming or pretending a right to the crown of these realms. And I do swear, that I do reject and detest, as an unchristian and impious position, That it is lawful to murder or destroy any person or persons whatsoever, for or under pretence of their being hereticks; and also that unchristian and impious principle, That no faith is to be kept with hereticks. I further declare, that it is no article of my faith, and that I do renounce, reject, and abjure the opinion, That princes excommunicated by the pope and council, or by any authority of the see of* [190] *Rome, or by any authority whatsoever, may be deposed or murdered by their subjects, or any person whatsoever. And I do declare, that I do not believe that the pope of* Rome, *or any other foreign prince, prelate, state, or potentate, hath, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. And I do solemnly, in the presence of*

(*d*) Upon the statutes against papists, before they were mitigated by the 18 *G.* 3., Lord *Mansfield* observes, that they were thought, when they passed, necessary to the safety of the state. On no other ground can they be defended. The political object the legislature had in view was to take from the Roman catholics that weight and influence which is naturally connected with landed property, beyond what personal estate can give. *Foone* v. *Blount, Cowp.* 466. *Trin.* 16 *G.* 3.

God, profess, testify, and declare, That I do make this declaration, and every part thereof, in the plain and ordinary sense of the words of this oath; without any evasion, equivocation, or mental reservation whatever, and without any dispensation already granted by the pope, or any authority of the see of Rome, *or any person whatever; and without thinking that I am or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the pope or any other persons or authority whatsoever shall dispense with or annul the same, or declare that it was null or void.*

Which oath shall be competent to the courts at Westminster or any general or quarter sessions to administer; Of which a register shall be kept in like manner as for the oaths required from persons qualifying for offices. And provided also, that nothing herein shall extend to any popish bishop, priest, jesuit, or schoolmaster, who shall not have taken and subscribed the above oath, before he shall have been apprehended, or any prosecution commenced against him.

[This oath is nearly similar in terms to that required by the 31 *G.*3. *c.*32. (See Oaths, 20. B.) But the privileges conceded to Roman catholics by the latter statutes are more extensive. (2)]

XLVI. *Summary of the* 31 *G.* 3. *c.* 32.

This act enables persons who profess the Roman catholic religion, personally to appear in any of his majesty's courts of chancery, king's bench, common pleas, or exchequer at Westminster, or in any court of general quarter sessions, of and for the county, city, or place where such person shall reside, and there in open court, between the hours of nine in the morning and two in the afternoon, to take, make, and subscribe at full length, [or with his mark, the name being written by the officer if he cannot write,] the oath and declaration therein contained, (for which see Oaths, 20. B.) a certificate of which, upon payment of 2*s.* shall be delivered by the proper officer of the court, which
[191] shall be sufficient evidence of such persons having taken and subscribed such declaration and oath, unless the same shall be falsified.

Lists of the persons who shall have taken the oaths are to be transmitted to the clerk of the privy council annually. § 2.

The 1 *Eliz. c.* 1. & 2. 23 *Eliz. c.* 1. 27 *Eliz. c.* 2. 29 *Eliz. c.* 6. 35 *Eliz. c.* 2. 2 (vulgo 1.) *Ja. c.* 4. 3 *J. c.* 4. 3 *Ja. c.* 5. 7 *Ja. c.* 6. 3 *Car.* 1. *c.* 2. 25 *Car.* 1. *c.* 2. 1 *W.* & *M. st.* 1. *c.* 8. 1 *G.* 1. *st.* 2.

(2) And now by 43 *G.* 3. *c.* 30. The declaration and oath expressed in 31 *G.* 3. *c.* 32. § 1. shall as to all who have taken, declared, and subscribed, or hereafter shall make, take, and subscribe the same in the manner there mentioned, give the same benefits and advantages, and operate to the same intents as by the 18 *G.* 3. *c.* 60. is enacted of the oath thereby subscribed.

c. 13. requiring persons to resort to their parish church or chapel, or some usual place where the common prayer is used, and inflicting penalties upon papists, priests, and those who shall hear or say mass, or shall refuse to take the oath of supremacy, or subscribe the declaration against transubstantiation, are repealed as to persons who shall take and subscribe the said oath and declaration. § 3, 4, & 18. Also the 1 *W. & M. st.* 1. *c.* 9. for removing papists from the cities of London and Westminster: the 30 *Car.* 2. *stat.* 2. *c.* 1. inflicting penalties on peers who shall come into the king's presence, not having taken the oath and made the declaration before required: the 1 *G.* 1. *st.* 2. *c.* 55. and 3 *G.* 1. *c.* 18. requiring papists to register their names and lands, deeds and wills; and the 7 & 8 *W.* 3. *c.* 24. and 1 *G.* 1. *st.* 2. *c.* 13. relative to practitioners in law. § 19, 20, 21, 22. — for all which see the respective heads of this title. But no assembly for religious worship is allowed under this act, until the place of meeting shall be certified to the justices, and recorded at the general or quarter sessions of the peace for the county, city, or place in which such meeting shall be held, nor is any person to perform any ecclesiastical function therein, until his name and description be also recorded at the sessions by the clerk of the peace, and no such place of assembly is to be locked during the meeting. § 5 & 6.

A penalty of 20*l.* is inflicted on those who shall maliciously disturb assemblies of religious worship permitted by this act, or misuse any priest or minister therein; but the benefit of the act is not to extend to any Roman catholic ecclesiastic who shall officiate in any place with a steeple and bell, or at any funeral in any church or church-yard, or who shall exercise any of the rites or ceremonies of his religion, or wear the habits of his order, save within a place of religious worship permitted by this act, or in a private house where not more than five persons are assembled besides those of the household, or who shall not previously to his officiating have taken the oath appointed by the act. § 10. But [192] ministers of any Roman catholic congregation who shall take the aforesaid oath are exempted from serving on juries, or being chosen to parochial or ward office; other Roman catholics are to execute such offices by deputy. § 7 & 8.

The act does not exempt Roman catholics from paying tithes, nor does it repeal any part of the 26 *G.* 3. *c.* 33. commonly called the marriage act, nor does it excuse persons from attending divine service on *Sunday,* except they come to some place of worship permitted by this act or the act of toleration. § 9. 11, 12.

Roman catholic schools are permitted under certain restrictions, for which see **Schools**, 3. and this title XXVII.

This act does not extend to Scotland; but by the 33 *G.* 3. *c.* 44. Roman catholics of that part of Great Britain who shall

take a similar oath before the sheriff-depute, or two justices of the peace, for the county where they reside, may hold, enjoy, alien, &c. real or personal property, as any other person or persons whatsoever, any thing in the act of the 8th & 9th session of the first parliament of Scotland of king William, or any other act or acts notwithstanding. But the act does not authorize Roman catholics to be governors, tutors, curators, or factors to the children of protestant parents, or to be otherwise employed in their education, or the trust or management of their affairs, or to be schoolmasters, professors, or public teachers of any science to any person or persons whomsoever within that part of the kingdom.]

Portion of tithes. See **Tithes.**

[Practice.

IT may be well here to transcribe the masterly sketch of the practice of the ecclesiastical courts given by Blackstone. Their ordinary course of proceeding is, First, by citation, to call the injuring party before them. Then by *libel*, *libellus*, a little book, or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined, and their depositions taken down in writing by an officer of the court. If defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to *plaintiff's answer* on oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer on oath to any matter however criminal that might be objected against them, was overturned by 13 *C.* 2. *c.* 12. § 4. (See **Purgation.**) When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion; from which there generally lies an *appeal* (see **Appeal**), though if the same be not appealed from in 15 days, it is final by the statute 13 *H.* 8. *c.* 19. See 3 *Bla. C. p.* 100.]

Praemonstratenses. See **Monasteries.**
Praemunire. See **Courts.**
Praestation. See **Pension.**
Preaching. See **Public worship.**

Prebendary.

THE law concerning prebendaries, canons, and other members of the chapter in cathedral and collegiate churches, falleth in under the title **Deans and Chapters.**

Prerogative Court.

THE prerogative court of the archbishop, is that court wherein all testaments are proved, and all administrations granted, where the party dying within the province hath *bona notabilia* in some other diocese than where he dieth; and is so called from the archbishop's having a *prerogative* throughout his whole province for the said purposes. 4 *Inst.* 335.

From this court the appeal lieth to the king in chancery. *Id.*

Presentation.

PRESENTATION, or collation, to a living, is treated of under the title **Benefice.**

Presentation to popish livings is treated of under the title **Popery.**

Priest. See **Ordination.**
Primate. See **Bishops.**
Prior. See **Monasteries.**
Private chapels. See **Chapel.**

Privileges and restraints of the clergy. (3) [194]

1. THE common law, to the intent that ecclesiastical persons might the better discharge their duty in celebration of divine service, and not to be entangled with temporal business, Not bound to serve in a temporal office.

(3) See *Com. Dig.* tit. *Ecclesiastical Persons* (D).

hath provided that they shall not be bound to serve in any temporal office. 1 *Inst.* 96.

And although a man holdeth lands or tenements, by reason whereof he ought to serve in a temporal office, yet if this man be made an ecclesiastical person within holy orders, he ought not to be elected to any such office; and if he be, he may have the king's writ for his discharge. 2 *Inst.* 3.

And this, although it be an office which he may execute by deputy: Thus in the case of the vicar of *Dartford*, *H.* 12 *G.* 2. the court granted to him a writ of privilege, against serving the office of expenditor to the commissioners of sewers; though it was insisted, that this was an office which might be executed by deputy. *Str.* 1107.

Not restrained from serving in a temporal office.

2. The popish foreign canon law forbids secular offices and employments to persons in holy orders. So do the following constitutions:

Othob. No clergyman shall be an advocate in the secular court in a cause of blood, or in any other cause but such as are allowed by law. And if any shall do otherwise, if it be in a cause of blood, he shall be *ipso facto* suspended from his office; and if in any other cause, he shall be punished by his diocesan according to his discretion. And in causes of blood which shall extend to life or member, we do strictly injoin, that no clergyman presume to be a judge or an assessor; and he who shall act contrary hereunto, besides the suspension from his office which he shall *ipso facto* incur, shall be otherwise punished according to the discretion of his superior: From which sentence of suspension he shall by no means be absolved by his diocesan, until he shall have made competent satisfaction. *Athon.* 91.

And, more particularly by another constitution of the same legate: Whereas it is unbecoming for clergymen employed in heavenly offices, to minister in secular affairs; we think it sordid and base, that certain clerks greedily pursuing earthly gain and
[195] temporal jurisdictions, do receive secular jurisdiction from laymen, so as to be named justices, and to become ministers of justice, which they cannot administer without injury to the canonical dispositions and to the clerical order; We desiring to extirpate this horrid vice, do strictly injoin all rectors of churches and perpetual vicars and all others whatsoever constituted in the order of priesthood, that they receive no secular jurisdiction from a secular person, or presume to exercise the same; and if they do, they shall relinquish the same within the space of two months, and never resume it; and whosoever shall attempt any thing contrary to the premises, shall be *ipso facto* suspended from his office and benefice; and if he shall intrude into his office or benefice during such suspension, he shall not escape canonical vengeance, which shall not be relaxed until he shall have made satis-

faction at the discretion of his diocesan, and taken an oath that he will not do the like again. Saving the privileges of our lord the king in this behalf. *Athon.* 89.

Which saving (Mr. *Johnson* says) intirely defeated the constitution. And in the former constitution there is also a saving, for such causes *as are allowed by law.* *Johns. Othob. Athon.* 91.

But if those savings had not been expressed; yet it is certain that the constitution could not have altered the law of the land in this respect. And it is well known that the kings of England in all ages have asserted a right to employ what subjects they pleased, of the clergy as well as laity, in any post of civil government; and in fact, very many clergymen have been chancellors, treasurers, and even chief justices of the king's bench, and consequently must have sate judges in cases of life and death. (4.)

And by the statute of *Articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 8. It is complained as followeth: The barons of the king's exchequer claiming by their privilege, that they ought to make answer to no complainant out of the same place, extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means, or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment. Unto which it is answered; It pleaseth our lord the king, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries, like as other; but *so long as they are occupied about the exchequer*, they shall not be bound to keep residence in their churches. This is *added of new by the council:* The king and his ancestors, since time out of mind [196] have used, *that clerks which are employed in his service*, during such time as they are in service, shall not be compelled to keep residence in their benefices; and such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church.

So long as they are occupied about the exchequer] And the court of exchequer may grant a prohibition to the ordinary, for any that ought to have the privilege of the exchequer, where the court may give the party remedy, or where a suit dependeth in the court of exchequer for the same cause; or where the king's service, which is the cause of the privilege, is hindered by the suit before the ordinary: as for non-residence, during the time

(4) *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmesbury. The judges therefore were usually created out of the sacred order, as was likewise the case among the Normans, and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. (1 *Bla. C.* 17.)

that he gave his necessary attendance in the exchequer for the king's service. 2 *Inst.* 624.

Added of new by the king's council] That is, by the common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliament, and in the preamble to these same *Articuli cleri*. 2 *Inst.* 624.

That clerks which are employed in his service] This branch is general, and not limited (as the former is) to the privilege of the exchequer; but extendeth to any other service of the king for the commonwealth: as if he be employed as an ambassador into any foreign nation, or the like service for the king, which is (as it is here said) for the commonwealth, which ever must be preferred before the private. 2 *Inst.* 624.

Not bound to serve in war.

3. Ecclesiastical persons have this privilege, that they ought not in person to serve in war. 2 *Inst.* 3.

Not bound to appear at the tourn or leet.

4. By the statute of 52 *H.* 3. *c.* 10. *For the tourns of sheriffs*, it is provided, that archbishops, bishops, *nor any religious men*, or women, *shall not need to come thither*, *except their appearance be specially required thereat for some other cause.*

The tourns of sheriffs] Nor consequently are they bound to appear at the leet, or view of frankpledge. 2 *Inst.* 4.

Nor any religious men] Men of religion, in the proper sense, are taken for those that are regulars, as being professed in some of the religious orders, as abbots, priors, and the like; but ecclesiastical persons that are seculars, that is, who do not live under the rules of any of the religious orders, as bishops, deans, archdeacons, prebends, parsons, vicars, and such like, are also within this act. 2 *Inst.* 121.

[197] *Shall not need to come thither*] That is, they are not compellable to come, but left to their own liberty. And if any man be grieved in any thing contrary to the purview of this statute, he shall have an action grounded upon the statute, for his remedy and relief therein. 2 *Inst.* 121, 122.

Except their appearance be specially required thereat for some other cause] As to be a witness or the like. 2 *Inst.* 121.

Not to be arrested in attending divine service.

5. By the 50 *Ed.* 3. *c.* 5. It is enacted as follows: Because that complaint is made by the clergy, that as well divers priests, bearing the sacrament to sick people, *and their clerks with them*, as divers other persons of holy church, *whilst they attend to divine services* in churches, church-yards, and other places dedicate to God, be sundry times taken and arrested *by authority royal*, and commandment of other temporal lords, in offence of God, and of the liberties of holy church, and in disturbance of divine services aforesaid; the king granteth and defendeth, upon grievous forfeiture, that none do the same from henceforth: so that collusion or feigned cause be not found in any of the said persons of holy church in this behalf.

And by the 1 *R.* 2. *c.* 15. It is thus further enacted: Because that prelates do complain themselves, that as well beneficed people of holy church, as other be arrested and drawn out as well of cathedral churches, as of other churches and their churchyards, and sometimes whilst they be intended to divine services, and also in other places, although they be bearing the body of our Lord Jesus Christ to sick persons, and so arrested and drawn out, be bound and brought to prison, *against the liberty of holy church;* it is ordained, that if any minister of the king or other, do arrest any person of holy church by such manner, *and thereof be duly convict,* he shall have imprisonment, and then be ransomed at the king's will, and make gree to the parties so arrested: provided, that the said people of holy church shall not hold them within the churches or sanctuaries by fraud or collusion in any manner.

And their clerks with them] By this it appears, that the clerk who is assistant may have this privilege. *Degge, p.* 1. *c.* 11.

Whilst they attend to divine services] It hath been adjudged upon this, that in going, continuing, and returning, to celebrate divine service, the priest ought not to be arrested, nor any who aid him in it. 12 *Co.* 100. (5)

By authority royal] But this extendeth only to cases betwixt party and party, and not to cases wherein the public peace is concerned, which are between the king and the party; and therefore a person may be apprehended going to or returning from [198] divine service, by a warrant from a justice of the peace, it being for a breach of the peace, and for the king; and so in like cases. *Wats. ch.* 34.

Thus, in the case of *Pitt* and *Webley, E.* 11 *J.* Pitt had a warrant from a justice of the peace, and served it upon Webley, as he was coming from church from sermon upon a week day. Whereupon Webley libelled against him in the spiritual court; and Pitt moved for a prohibition, and framed the suggestion upon these statutes, which prohibit arrests in time of divine service, and in going and returning to and from the church. But it was said that those statutes are where the matters are betwixt one common person and another, but not where it concerns the king and a common person, as here it did, this arrest being made at the king's suit. And to this opinion the court seemed to incline, and that there was just cause for a prohibition. But further day being given, the parties in the mean while agreed. *Cro. Ja.* 321.

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(5) Though it be through ignorance, and he is afterwards discharged; so one may be sued for it in the ecclesiastical court, and shall pay costs, 2 *Bulst.* 72.

Against the liberties of holy church] By which it appears that these statutes are but an affirmance of the common law, and in maintenance of the liberties of holy church. 12 *Co.* 100.

And thereof be duly convict] The party grieved may have an action upon the statute: for when any thing is prohibited by an act, although the act doth not give an action, yet action lieth upon it. 12 *Co.* 100.

And if an arrest be made contrary to these statutes, and the person arresting doth presently discharge the person arrested upon pretence of ignorance or the like; this will not excuse the contempt in making the arrest. *Wats. ch.* 34.

However, if such undue arrest be made, the arrest is good; so that if a rescous be made, and thereby any person killed, the killing is murder. *Wats. ch.* 34.

And Dr. *Watson* says, he that doth offend against the aforesaid statutes, may not only be fined in the temporal court, but also may be excommunicated by the ecclesiastical judge, and condemned in costs. *Wats. ch.* 34.

Laying violent hands on a clerk. [See *Com. Dig.* tit. *Prohibition* (G. 12.)]

6. By the statute 13 *Ed.* 1. *st.* 4. it is thus enacted: For laying violent hands on a clerk, it hath been granted, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin. And hereof the spiritual *judge shall have power to take knowledge notwithstanding the king's prohibition. *[199]

And by the 9 *Ed.* 2. *c.* 3. If any *lay violent hands* on a clerk, *amends for the peace broken shall be before the king, and for the excommunication before a prelate*, that penance corporal may be enjoined; which if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, *it shall be required before the prelate, and the king's prohibition shall not lie.*

Lay violent hands] A prohibition having been granted, where a clerk libelled against another in the spiritual court, for that he beat him, or at leastwise assaulted him with a bill, and would have stricken him, and called him goose, and woodcock, and many such words; the court held that the prohibition did well lie: for although for the *laying violent hands* on a clerk, the suit ought to be in the spiritual court [*semb.* if excommunication is the object] yet for an assault only, the suit ought to be at the common law. *Cro. El.* 753. (6)

So also where a prohibition was granted to stay process in the spiritual court, against one who seeing an assault made upon his servant by a clerk, came in aid of his servant, and laid his hands peaceably upon the clerk; *Gawdy*, chief justice, held, that this

(6) *Love* v. *Prin.*

case was out of these statutes, because the party had good cause to beat the clerk: and the prohibition stood. *Cro.El.* 655. (7)

So also, if a clergyman be arrested by process of law, he cannot for this sue in the ecclesiastical court. 2 *Inst.* 492.

The amends for the peace broken shall be before the king] If the clerk sue in court christian for damages for the battery, he is in case of *præmunire*; for in that case the ecclesiastical judge ought to proceed *ex officio*, only to correct the sin. 2 *Inst.* 492. 620.

And though he do not directly sue for such damages there; yet, if a man is excommunicate for laying violent hands on a clerk, and the spiritual court deny absolution till amends be made to the party for the battery; a prohibition will be granted. *Gibs.* 9.

And for the excommunication before a prelate] This is the known punishment assigned to that crime by the canon law; to which the practice of the church of England has been conformable, both before and since the reformation. *Gibs.* 9.

It shall be required before the prelate, and the king's prohibition shall not lie] Or, in case the money for redeeming of penance is sued for in the spiritual court, and a prohibition is granted by the temporal; then a writ of consultation is provided for relief [200] of the party. *Gibs.* 9. (8)

Shall have the benefit of clergy more than once. (See tit. Benefit of Clergy, and notes there.)

7. He that is within orders hath a privilege, that albeit he have had the privilege of his clergy for a felony, he may have his clergy afterwards again, and so cannot a layman: And he that is within orders, and hath his clergy allowed, shall not be branded in the hand. And these privileges are given by act of parliament. 2 *Inst.* 637. 2 *H.H.* 389.

And although a clergyman in orders shall not be burnt in the hand, yet after his discharge given by the court, he shall have the same privilege, as if he had been burnt in the hand; and therefore shall not be drawn in question in the ecclesiastical court, to deprive him, or inflict any ecclesiastical censure upon him. 2 *H.H.* 389.

Exempted from serving on juries.

8. Such as be within orders of the ministry, or clergy, cannot be empannelled as jurors. *Lamb. Just.* 396. (*e*)

Cannot be an approver.

9. It seems to be agreed, that a person in holy orders cannot be an approver; because it is a rule, that no member of the clergy can sue any appeal whatsoever, in a matter or cause of death. 2 *Haw.* 205.

May counterplead the waging of battel.

10. A clergyman being an appellant, the defendant cannot

(7) *Kelley* v. *Walker*; see 3 *Bla. Com.* 143. 1 *Salk.* 199.

(8) Suits were always allowable in spiritual courts for money agreed to be given as a commutation for penance. *Art. Cler.* 9 *Ed.* 2. *c.* 4. F.N.B. 53. 2 *Roll. Rep.* 384.

(*e*) *Beecher*'s case, 4 *Leon.* 190.

wage his battel; but the clerk being appellant may counterplead the wager of battel; and compel the appellee to put himself upon his country. 2 *Haw.* 427. (9)

Shall not be amerced after the quantity of his spiritual benefice.

11. By the 9 *H.* 3. *c.* 14. No man of the church shall be *amerced* after the quantity of his spiritual *benefice*, but after his *lay tenement* and after the quantity of his offence.

Amerced] Here appeareth a privilege of the church, that if an ecclesiastical person be amerced (though amerciaments belong to the king) yet he shall not be amerced in respect of his ecclesiastical promotion or benefice, but in respect of his lay fee, and according to the quantity of his fault; which is to be affeered. 2 *Inst.* 29.

Benefice] Benefice is a large word, and is taken for any ecclesiastical promotion, or spiritual living whatsoever. 2 *Inst.* 29.

Lay-tenement] And if a spiritual person be amerced above the quantity of his lay-tenement, he shall have a writ to prohibit the levying of it. *Gibs.* 13. (*g*)

How far subject to pension or services to the king.

12. By the 1 *Ed.* 3. *st.* 2. *c.* 10. Whereas archbishops, bishops, abbots, priors, abbesses, and prioresses have been sore grieved by the requests of the king and his progenitors, which have *desired them by great threats, for their clerks and other servants, for great pensions, prebends, churches, and corrodies, so that they could nothing give nor do to such as had done them service, nor to their friends, to their great charge and damage; the king granteth, that from henceforth he will no more such things desire, *but where he ought.*

*[201]

But where he ought] For, of common right, the king, as founder of archbishopricks, bishopricks, and many religious houses, had a corrody, or a pension, in the several foundations; a corrody, for his vadelets, who attend them; and a pension, for a chaplain, such as he should specially recommend, till the respective possessor should promote him to a competent benefice. *Gibs.* 16.

If any ecclesiastical person shall be in fear or doubt, that his goods, or chattels, or beasts, or the goods of his farmer, should be taken by the ministers of the king, for the business of the king, he may purchase a protection. 2 *Inst.* 4.

No demean or proper cart for the necessary use of any ecclesiastical person, ought to be taken for the king's carriage; but they are exempted by the ancient law of England from any such carriage: and this was an ancient privilege belonging to holy church. 2 *Inst.* 35.

But there is no special exemption in the yearly mutiny acts, for clergymen, in respect of the soldiers' carriages.

(9) Appeal and wager of battel abolished, 59 *G.* 3. *c.* 46.
(*g*) *Mag. Chart. c.* 14. *Reg. f.* 184. *b.*

13. If a person be bound in a recognizance in the chancery or other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods. 2 *Inst.* 4. (*h*)

The sheriff cannot levy of his ecclesiastical goods.

In an action brought against a person, wherein a *capias* lieth (for example, an account) the sheriff returns that he is *a clergyman beneficed having no lay fee*, in which he may be summoned; in this case the plaintiff cannot have a *capias* to the sheriff to take the body of the person, but he shall have a writ to the bishop, to cause the person to come and appear. But if he had returned, that he is *a clergyman having no lay fee*, then is a *capias* to be granted to the sheriff; for that it appeared not by the return that he had a benefice, so as he might be warned by the bishop his diocesan; and no man can be exempt from justice. 2 *Inst.* 4.

M. 9 *W. Mosely* and *Warburton*. On a *fieri facias* against Warburton, a fellow of Winchester college, the sheriff returned, that he is *a clergyman beneficed having no lay fee*. Hereupon a *fieri facias* was issue to the bishop, to levy the same of his ecclesiastical goods. The bishop sent his mandate to the warden and fellows of the college to sequester his salary. They answer that they have not power to do it. The bishop moved the court to know, whether he might compel them by ecclesiastical censures. By *Holt*, chief justice; if a prebendary hath a sole body, the bishop upon a *levari facias* of his ecclesiastical goods, may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. In this case, the profits of the fellowship are but casual dividends, in which before division Warburton hath no interest, so that they do not make an estate; and it seems in this case Warburton is not a clerk beneficed, and the bishop may return that he hath no ecclesiastical goods. *Ld. Ray.* 265. 1 *Salk.* 320. [202]

14. *Articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 9. It is complained, that the king's officers, as sheriffs and other, do enter into the *fees of*

Distresses not to be

(*h*) *Languit* v. *Jones*, *Stra.* 87. And an attachment will go against the chancellor for not returning it. *The King* v. *The Bishop of St. Asaph*, 1 *Wils.* 332. It has been decided, that the assignees under an insolvent act are not entitled to demand and receive the profits of an ecclesiastical benefice, which have accrued subsequent to the assignment, nor can they maintain an action for the same, though included in the schedule of the insolvent. *Arbuckle* v. *Cowtan*, 3 *Bos. & Pul.* 321.

taken in the fees of the church. *the church* to take distresses, and sometimes they take the *parson's* beasts in the king's highway, where they have nothing but the land belonging to the church. *Answer:* The king's pleasure is, that *from henceforth such distresses shall neither be taken* in the king's highway, nor in the fees wherewith churches in times past *have been endowed;* nevertheless he willeth distresses to be taken in *possessions of the church newly purchased by ecclesiastical persons.*

Fees of the church] That is, lands belonging to the church. *Lindw.* 263.

Parsons] Here parsons (rectores) be named but for example; for this law extendeth to other ecclesiastical persons. 2 *Inst.* 627.

From henceforth such distresses shall not be taken] Notwithstanding that the king's officers, as sheriffs and others, are mentioned in the complaining part, yet Lord *Coke* says this law bindeth not the king, when he is party, for any debt or duty due unto him, because the distress or other process for the king is not expressly named (in the enacting part), but distresses generally: And this appeareth, he says, by a book case (27 *Ass.* p. 66); a prior brought a bill of trespass against the sheriff, for entering into his sanctuary, that is, within the circuit of the site of his priory, and took away his beasts. The defendant said, that he was sheriff, and that the prior lost issues in the court of common [203] pleas, and a writ issued to him to levy the issues, and that he entered into the sanctuary because he could not find a distress without. Whereupon the plaintiff demurred, and judgment was given against the plaintiff. Which proveth that the sheriff in that case could not have returned, upon the process to him directed, that he is a clerk beneficed having no lay fee. 2 *Inst.* 627. Nevertheless, the words are, that *such* distresses (*quod districtiones hujusmodi*) shall not be taken; which manifestly refer to the complaint preceding.

Shall neither be taken] And if they be taken, the party aggrieved may have a writ for his relief. *Gibs.* 15.

Have been endowed] This is to be taken in a large sense; for here the fees that they have by reason of their foundation, or by reason of their dotation or endowment, are included. 2 *Inst.* 627.

Endowed] The possessions of the church are the endowment of the church, and they are accounted as tenants in dower. 2 *Inst.* 627.

Possessions of the church newly purchased by ecclesiastical persons] Concerning tasks, tenths, and fifteenths granted by parliament to the king, the possessions of ecclesiastical persons, which they acquired since the 20 *Ed.* 1. either by purchase or act in law were chargeable thereunto: but those which they had at that time were not charged therewith. And the reason thereof was

this: The pope (after the example of the high priest among the Jews, who had of the Levites the tenth part of the tithe) claimed by pretext thereof a yearly tenth part of the value of all ecclesiastical livings. This portion or tribute was by ordinance yielded to the pope in 20 *Ed.* 1., and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know, and be answered of the yearly revenue, so as the ecclesiastical livings, chargeable with that tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, lest they should be doubly charged: but their possessions acquired after that taxation were liable to the temporal tenths or fifteenths, because they were not charged to the other. 2 *Inst.* 627.

Newly purchased] In which the temporal lords had a right of distraining; which right they ought not to lose, by the possessions coming into the hands of ecclesiastical persons. For where any burden real lieth upon any land or place, the thing itself passeth with its burden. *Lindw.* 268.

Purchased] Either to their own use, or to the use of the church. *Lindw.* 268. [204]

Shall not be taken on a statute merchant or staple.

15. If any ecclesiastical person knowledge a statute merchant or statute staple, or a recognizance in the nature of a statute staple; his body shall not be taken by force of any process thereupon. 2 *Inst.* 4.

Free from tolls and other charges by the common law.

16. Amongst the Saxons, the lands of the clergy were charged to castles, bridges, and expeditions. *Wake's State of the Ch.* 2.

But after the introduction of the Romish canon law, they obtained exemptions.

And lord *Coke* says, that ecclesiastical persons ought to be quit and discharged of tolls and customs, avirage, pontage, paviage, and the like, for their ecclesiastical goods; and if they be molested therefore, they may have a writ for their discharge. 2 *Inst.* 3.

Which writ they may have out of the chancery, made of course without petition or motion, directed to the party that distrains or disturbs them for any of these things, commanding them to desist; and if such writ be not obeyed, the cursitor, of course, will make out an *alias* and *pluries*; and if none of these will be obeyed, an attachment to arrest the party, and detain him till he obey. *Degge, p.* 1. *c.* 11.

But this and the like is always to be understood, with this exception, viz. provided that no act of parliament hath ordered otherwise.

Not freed from general charges

17. Anciently, indeed, it was held, that clergymen are not to be burdened in the general charges with the laity of this realm;

by act of parliament. neither to be troubled or incumbered, unless they be specially named and expressly charged by some statute. *God. Rep.* 194.

Thus Dr. *Godolphin* observes, that the statute of *hue* and *cry* charges the *inhabitants and resiants*; but it hath never been taken, says he, that parsons and vicars are included, or shall be contributory in robberies. In the same statute are *watchings*; yet the clergy thereby are never charged. The statute for *highways*, charged every *householder*; yet this hath never been taken by usage to charge the clergy. Also, the charge of *gaols*; the act says all *resiants* shall pay: yet have the clergy never been charged. Thus, where the *bridge* acts say, *all inhabitants* shall be assessed; it must mean all such only as are chargeable to pontage. *God. Rep.* 194, 195.

But now the contrary doctrine prevails, that clergymen are liable to all charges by act of parliament, unless they are specially exempted.

[205] Thus they are, both in respect of their tithes and glebes, liable to contribute to watch and ward, to the repair of the highways, and may be rated or taxed by the commissioners of sewers; they, as well as laymen, are chargeable to the poor maimed soldiers or poor prisoners, county rates, and shall contribute towards satisfying for a robbery committed within the hundred, and all other public charges imposed by act of parliament. And this hath been resolved upon debate, as *Hale*, chief justice, said, before all the judges, *T.* 27 *C.* 2. in the case of *Webb* and *Batchelor*. *Wats. ch.* 40. 3 *Keb.* 255. 476. 1 *Ventr.* 273. 2 *Lev.* 139. *Lutw.* 1563.

And particularly, in the case of *bridges*, the statute of the 22 *H.* 8. says, the justices of the peace shall assess *every inhabitant* towards their repair: by which words, *every inhabitant*, lord *Coke* says, all privileges of exemptions or discharges whatsoever from contribution (if any were) are taken away, although the exemption were by act of parliament. 2 *Inst.* 704.

And in respect of the *highways*, where the statutes direct, that the *parishioners of every parish* shall repair, Mr. *Hawkins* observes thereupon, that persons in holy orders are within the purview of these statutes, in respect of their spiritual possessions, as much as any other persons whatsoever, in respect of any other possessions; for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others. 1 *Haw.* 204.

Apparel. 18. The *canonical* habit (properly speaking) is that which is injoined by the canons of the church. But in a matter so fluctuating as that of dress, it is impossible to lay down rules for apparel in one age, which will not appear ridiculous in the next. In such case, the general rule can only be, that clergymen shall appear in habit and dress such as shall comport with gravity and decency, without effeminacy or affectation.

The canons for the habit of clergymen are chiefly these two that follow: which, for the reason above mentioned, are now become matters only of curiosity and speculation.

By a constitution of archbishop *Stratford*, in the year 1343, in the reign of king Edward the third: The outward habit often shews the inward disposition; and though the behaviour of the clergy ought to be the instruction of the laity, yet the prevailing excesses of the clergy, as to tonsure, garments, and trappings, give abominable scandal to the people; because such as have dignities, parsonages, honourable prebends, and benefices with [206] cure, and even men in holy orders, scorn the tonsure, (which is the mark of perfection, and of the heavenly kingdom,) and distinguish themselves with hair hanging down to their shoulders, in an effeminate manner; and apparel themselves like soldiers rather than clerks, with an upper jump remarkably short, with excessive wide or long sleeves, not covering the elbows, but hanging down; their hair curled and powdered, and caps with tippets of a wonderful length; with long beards; and rings on their fingers; girt with girdles exceedingly large and costly, having purses enamelled with figures and various sculptures gilt, hanging with knives (like swords) in open view; their shoes chequered with red and green, exceeding long, and variously indented; with croppers to their saddles, and horns hanging at the necks of their horses; and cloaks furred on the edges, contrary to the canonical sanctions, so that there is no distinction between clerks and laicks, which rendereth them unworthy of the privilege of their order: we therefore, to obviate these miscarriages, as well of the masters and scholars within the universities of our province, as of those without, with the approbation of this sacred council do ordain, that all beneficed men, those especially in holy orders, in our province, have their *tonsure* as comports with the state of clergymen; and if any of them do exceed by going in a remarkably short and close upper garment, with long or unreasonably wide sleeves, not covering the elbow, but hanging down, with hair unclipped, long beards, with rings on their fingers in public (excepting those of honour and dignity), or exceed in any particular before expressed; such of them as have benefices, unless within six months' time they shall effectually reform upon admonition given, shall incur suspension from their office *ipso facto*, and if they continue under it for three months, they shall from that time be suspended from their benefice *ipso jure*, without any further admonition: And they shall not be absolved from this sentence by their diocesans, till they pay the fifth part of one year's profit of their benefices to be distributed to the poor. If they be unbeneficed, they shall be disabled from obtaining a benefice for four months. And such as are students in the universities, and pass for clerks, if they do not effectually abstain

from the premises, shall be *ipso facto* disabled from taking any ecclesiastical degrees or honours in those universities, till by their
[207] behaviour they give proof of their discretion as becometh scholars. Yet by this constitution we intend not to abridge clerks of open wide *surcoats*, called table coats, with fitting sleeves to be used at seasonable times and places; nor of short and close garments, whilst they are travelling in the country, at their own discretion. *Lind.* 122. *Johns. Stratf.*

Tonsure.] This signifieth sometimes not only the shaved spot on the crown of the head, but the whole ecclesiastical cut, or having the hair clipt in such a fashion, that the ears might be seen, but not the forehead. *Johns. Stratf.*

Surcoats.] Made to save better cloaths, especially in eating and drinking at home. *Lind.* 124.

And by the seventy-fourth canon of the canons in the year 1603. Archbishops and bishops shall use the accustomed apparel of their degrees: Deans, masters of colleges, archdeacons, and prebendaries in cathedral and collegiate churches (being priests or deacons), doctors in divinity, law, and physic, bachelors in divinity, masters of arts, and bachelors of law, having any ecclesiastical living, shall usually wear gowns with standing collars and sleeves strait at the hands, or wide sleeves, as is used in the universities, with hoods or tippets of silk or sarcenet, and square caps. And all other ministers shall also usually wear the like apparel as is aforesaid, except tippets only. And all the said ecclesiastical persons above mentioned shall usually wear in their journies cloaks with sleeves, commonly called priests' cloaks, with guards, welts, long buttons, or cuts. And no ecclesiastical person shall wear any coife or wrought night-cap, but only plain night-caps of black silk, satin, or velvet. In private houses, and in their studies, the said persons ecclesiastical may use any comely and scholar-like apparel, provided that it be not cut or pinkt, and in public not to go in their doublet and hose, without coats or cassocks. And not to wear any light-coloured stockings. Poor beneficed men and curates (not being able to provide themselves long gowns) may go in short gowns of the fashion aforesaid.

Particularly, the *band*, we may observe, is no part of the canonical habit; being not so ancient as any canon of the church. Archbishop Laud is pictured in a ruff, which was worn at that time both by clergymen and gentlemen of the law; as also long before, during the reigns of king James the first, and of queen
[208] Elizabeth. The band came in with the puritans and other sectaries, upon the downfal of episcopacy; and in a few years afterwards became the common habit of men of all denominations and professions: which giving way in its turn, was yet retained by the gentlemen of the long robe (both ecclesiastical and temporal), only because they would not follow every caprice of

fashion. Indeed most of the peculiar habits, both in the church and in courts of justice and in the universities, were in their day the common habit of the nation; and were retained by persons and in places of importance, only as having an air of antiquity, and thereby in some sort conducing to attract veneration: and the same on the other hand, in proportion do persuade to a suitable gravity of demeanor: for an irreverent behaviour, in a venerable habit, is extremely burlesque and ungraceful.

19. By *Canon* 75. No ecclesiastical persons shall at any time, other than for their honest necessities, resort to any tavern or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking, or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful game. But at all times convenient, they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, having always in mind, that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures to be inflicted with severity, according to the qualities of their offences.

Shunning vicious excesses.

20. Nevertheless Lord *Coke* says, by the common law of the land, clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty and office. 2 *Inst*. 309.

Recreations.

And albeit spiritual persons (he says) are prohibited, by the canon law, to hunt; yet by the common law they may use the recreation of hunting. And after the decease of every archbishop and bishop (amongst other things) the king time out of mind hath had his kennel of hounds, or a composition for the same. 2 *Inst*. 309.

The foundation of which custom was this: It appeareth by many records, that by the law and custom of England, no bishop could make his will of his goods or chattels coming of his bishoprick, without the king's licence. Whereupon the bishops, that [209] they might freely make their wills, yielded to give to the king after their deceases respectively for ever six things: 1. Their best horse or palfrey, with bridle and saddle. 2. A cloak with a cape. 3. One cup with a cover. 4. One bason and ewer. 5. One ring of gold. 6. Their kennel of hounds. 2 *Inst*. 338.

21. By the 1 *H*. 7. *c*. 4. It shall be lawful to all archbishops and bishops, and other ordinaries having episcopal jurisdiction, to punish and chastise priests, clerks, and religious men, as shall be convicted before them by examination, and other lawful proof requisite by the law of the church, of advoutry, fornication, incest,

May be imprisoned by the spiritual judge for incontinence.

or any other fleshly incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass.

Shall not take to farm nor traffick.

22. By 57 *G*.3. *c*.99. which is entitled (*inter alia*) "*An act to amend the laws relating to spiritual persons holding of farms.*"

So much of the 21 *H*.8. *c*.13. [*viz.* § 1—8. and § 35. as relates to spiritual persons holding of farms, and all 43 *G*.3. *c*.84. and *c*.109. are repealed. (§ 1.)

§ 2. Enacts, that no spiritual person having any dignity, prebend, canonry, benefice, or stipendiary curacy, or lectureship, shall take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life or years, or at will, any lands, exceeding in the whole 80 acres, for the purpose of occupying, using, or cultivating the same, without the special consent in writing of the bishop of the diocese, wherein such dignity, &c. is locally situate, and such permission shall specify the number of years (not beyond seven) for which the same is given; and every such spiritual person, who without permission shall take any more land than 80 acres, shall forfeit 40*s*. for every acre above that number, for every year during which he shall occupy the same, to be recovered by and to the use of any person who may inform and sue for the same.

By § 3. No such spiritual person shall by himself or another to his use, engage in or carry on any trade or dealing for gain (1), or deal in any goods or merchandize, by buying and selling for profit in any fair or market, on pain of forfeiting the value of such goods bargained or bought to sell again contrary to this act; and every bargain or contract so made by him, or by any person to his use, contrary to this act, shall be void, and the one half of every such forfeiture shall go to his majesty, and the other half to him that will sue for the same.

By § 4. Nothing herein relating to being engaged in trade, or dealing, or buying or selling, shall extend to or subject to any penalty, any spiritual person for keeping a school, or acting as a

(1) *Cases on* 21 *H*. 8. *c*. 13.] It seems that if a clergyman *will* trade, he may make valid contracts, and is liable to be made a bankrupt: for he cannot take advantage of the breach of the statute 21 *H*. 8. to excuse himself for the breach of another, Ex parte, *Meymott*, 1747. 1 *Atk*. 196. *Cooke's Bpt. Laws*, 33. and see F. N. B. 227. F. an agreement in 1800 for a lease of a farm to a clergyman for the purpose of occupation is void, under Stat. 21 *H*. 8. *c*. 13. But whether a clergyman buying a lease as property, or taking it by devolution of law as next of kin, &c. is within that statute, the court will not determine, *Morris* v. *Preston*, 7 *Ves*. 556. It is said that owing to the narrow incomes of the clergy, the above provisions against their carrying on trades are necessarily disregarded in many parts of Wales.

schoolmaster or tutor, or being in any way engaged in giving instruction or education for profit or reward, or for buying or selling, or doing any other act in the conduct of, or carrying on, or in relation to the management of such school or employment; or to any spiritual person for buying any goods or merchandize, or articles of any description, which shall without fraud be bought to be used, for his family or household, and afterwards selling the same again, or any parts thereof, which he may not want or choose to keep, though at an advanced price; nor for buying or selling again for profit any kind of cattle, corn, or other things necessary for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne, farms, lands, tenements, or hereditaments which may be lawfully held by such spiritual person, or by some other to his use; but nothing herein shall authorize such spiritual person to sell such cattle, corn, &c. in person, in any market, fair, or place of public sale.]

23. No spiritual person shall have, use, or keep by himself or by any person to his use any tanhouse; nor any brewhouse, to any other use than only to be spent and occupied in his own house, on pain of 10*l.* a month; half to the king, and half to him that will sue in any of the king's courts. 21 *H.* 8. *c.* 13. *s.* 32. [210]

Shall not keep a tanhouse or brewhouse.

24. By *Canon* 76. No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life, as a layman; upon pain of excommunication. And the churchwardens shall present him. [211]

Shall not relinquish his profession.

25. After all, these distinctions of the clergy are shadows rather than substance; being most of them about matters which are obsolete and of no significance. The *restraints*, as to the scope and purport of them, are such as the clergy for the most part would chuse to put upon themselves: and the *privileges*, such as they are, seem to be scarcely worth claiming; and some of them one would almost imagine to have been calculated to bring a disgrace upon the clergy, rather than to be of any real benefit to them; for why should a clergyman be protected from paying his just debts more than any other person, or be saved from punishment for a crime for which another person ought to be hanged? And it is hoped, there hath not been one instance, of a clergyman having needed to claim the privilege of his order a second time, for a crime for which a layman by the laws of his country should suffer death.

Conclusion.

Probate of wills. See Wills.

Proctor.

1. PROCTORS are officers established to represent in judgment the parties who empower them (by warrant under their hands called a *proxy*) to appear for them (2), to explain their rights, to manage and instruct their cause, and to demand judgment. 2 *Dom.* 583.

2. By the 3 *J. c.* 5. No recusant convict shall practise in the civil law as proctor. § 8. [Altered by the 31 *G.* 3. *c.* 32. which introduces a new oath to be taken by Roman catholicks practising the law. For which see **Popery**, XXXV. and **Oaths**, 20 B.]

And by the 5 *G.* 2. *c.* 18. No proctor in any court shall be a justice of the peace [within any *county* in England or Wales] during such time as he shall continue in the business and practice of a proctor. § 2. [on penalty of 100*l.* *Ib.* § 3.]

3. [By 55 G. 3. *c.* 184. Sched. Part First, every admission of any person to the office of proctor in any of the courts, shall be
[212] upon a 25*l.* stamp. And every practising solicitor, attorney, notary, *proctor*, agent, or procurator, must take out a certificate annually; upon which there shall be charged, if he reside in the city of London or Westminster, or within the limits of the two-penny post in England, or within the city or shire of Edinburgh, and shall have been admitted to his office three years, 12*l.*; if not so long, 6*l.* If he shall reside elsewhere, and have been admitted three years, 8*l.*; if not so long, 4*l.*: but no one person is obliged to take out more than one such certificate, though he may act in more than one of the above capacities, or in several of the courts aforesaid. *Ibid.*]

4. *Can.* 129. None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the judge, or by act in court; or unless in the beginning of the suit, he be by a true and sufficient proxy thereunto warranted and enabled. We call that proxy sufficient, which is strengthened and confirmed by some authentical seal, and party's approbation, or at least his ratification therewithal concurring. All which proxies shall be forthwith by the said proctors exhibited into the court, and be safely kept and preserved by the register in the public registry of the said court. And if any register or proctor shall offend herein, he shall be

(2) It is the practice of the ecclesiastical court, that the party coming into court and doing any act himself shall vacate a power given to another to act for him. *Hayes* v. *Exeter College, Oxon.* 12 *Ves.* 346.

secluded from the exercise of his office for the space of two months, without hope of release or restoring.

5. *Otho.* Whereas a custom is said to prevail, that he who is cited to a certain day, constitutes a proctor for that day without letters, or by letters not sealed with an authentic seal; by which means it happeneth, that whilst such proctor will not prove his mandate, or confirm his letters by witnesses, or some other impediment comes in the way, nothing is done that day, nor on the following day, the proctor's office being at an end; and so all former diligence is lost without any effect: As a caution against this fallacy, we do ordain, that for the future a special proctor be constituted absolutely without any limitation of time; or if he be constituted for the day, yet not for one day only, but for several days, to be continued if need be. And the mandate shall be proved by an authentic writing: unless he be constituted in the acts of court, or the constitutor cannot easily find an authentic seal. *Athon.* 61.

6. *Pecchani.* We do ordain, that no dean, archdeacon, or his official, or bishop's official, shall set his seal to any proxy, unless it be publicly requested of him in court, or out of court when he who constituteth the proctor and is known to be the principal party is present, and personally requesteth it: And whatsoever dean, archdeacon, or his official, or official of the bishop, shall do the contrary out of certain malice, shall be *ipso facto* suspended from his office and benefice for three years. [213] And if any advocate shall procure a false proxy to be made, he shall be suspended for three years from his office of advocate, and be disabled to hold any ecclesiastical benefice, and if he be married or bigamus [*whereby in those days he was incapacitated to hold a benefice*] he shall be excommunicated *ipso facto*; and whatever shall be done by virtue of such false proxy shall be utterly void to all intents and purposes, and the proctor who was the chief actor in such falsity shall be for ever repelled from executing any legal act. And all of these nevertheless, if they shall be convicted, shall be bound to render damages to the party injured. *Lind.* 76.

To obtain advice of advocates.

7. *Can.* 130. For lessening and abridging the multitude of suits and contentions, as also for preventing the complaints of suitors in courts ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of proctors; and likewise for the furtherance and increase of learning, and the advancement of civil and canon law; following the laudable customs heretofore observed in the courts pertaining to the archbishop, we will and ordain that no proctor exercising in any of them shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under pain of a year's

suspension from his practice; neither shall the judge have power to release or mitigate the said penalty, without express mandate and authority from the archbishop.

H. 2. *W. Leigh's* case. A proctor of doctors' commons, who had done business without the advice of an advocate, contrary to the canon, and refused to pay a tax of 10*s.* imposed upon him by order of the court towards the charges of the house, and was suspended from his office, prayed a mandamus in the court of king's bench to be restored: but it was denied, and said by the court, that officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken, the king's bench cannot relieve: for in all cases, where such judges keep within their bounds, no other court can correct their errors in proceedings; and if any wrong be done in this case, the party must appeal. *Gibs.* 995. 3 *Mod.* 332.

[214] 8. *Can.* 131. No judge in any of the said courts shall admit any libel or any other matter, without the advice of an advocate admitted to practise in the same court, or without his subscription; nor shall any proctor conclude any cause depending, without the knowledge of the advocate retained and fee'd in the cause: which if any proctor shall do or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause; he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete.

Silencing proctors.

9. *Can.* 133. Forasmuch as it is found by experience, that the loud and confused cries and clamours of proctors in the courts of the archbishop, are not only troublesome and offensive to the judges and advocates, but also give occasion to the standers-by of contempt and calumny towards the court itself; to the end that more respect may be had to the dignity of the judge, and that causes may more easily and commodiously be handled and dispatched, we charge and injoin, that all proctors in the said courts do especially intend that the acts be faithfully entered and set down by the register, according to the advice and direction of the advocate; that the said proctors refrain loud speech and babbling, and behave themselves quietly and modestly, and that when either the judges or advocates or any of them shall happen to speak, they presently be silent; upon pain of silencing for two whole terms then immediately following every such offence of theirs: And if any of them shall the second time offend therein,

and after due monition shall not reform himself, let him be for ever removed from his practice.

10. It hath been adjudged that no mandamus lies to restore a proctor of doctors' commons, admitting that no appeal lay from the dean of the arches to the archbishop as visitor; because this is an ecclesiastical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle, or inquire into this sentence or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged, that if a mandamus did not lie in this case, the party would be without remedy, for that no assize would lie of this office; and though an action on the case might lie, yet it may be defective, because a jury may not well compute the damages in proportion to the loss of a man's livelihood; besides it was urged, that a mandamus ought to lie in this case, as well as for an attorney of an inferior court, because this is an officer of a more public concern. 3 *Bac. Abr.* 531.

Restoring proctors.

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For the fees of proctors; see tit. Fees.

Procuration. See Visitation.

Profaneness.

1. ALL blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule; all impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous; inasmuch as they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime. 1 *Haw. P. C.* 7. (3)

Profaneness indictable by the common law.

Also, seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace; as these, Your

(3) For Christianity is part of the laws of England, *Taylor*'s case. 1 *Ventr.* 293. 3 *Keb.* 197. 607. 621. *Woolston*'s case, *Fitzg.* 64. *Stra.* 834. So per *Prisot* C. J. of C. P. 34 *H.* VI. 40. "*Scripture est common ley sur quel* tous *manieres de leis sont fondes.*" And see *Annett*'s case, 1 *Bla. R.* 395.

religion is a new religion, preaching is but prattling, and prayer once a day is more edifying. 1 *Haw.* 7.

Depraving the Christian religion by words or writing. 2. By the 9 & 10 *W. c.* 32. If any person, having been educated in, or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking, [deny any one of the Persons in the Holy Trinity to be God *,] or shall assert or maintain there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall upon indictment or information in any of his majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more witnesses: [216] he shall for the first offence be disabled to have any office, or employment, or any profit appertaining thereunto; for the second offence shall be disabled to prosecute any action or information in any court of law or equity, or to be guardian of any child, or executor, or administrator of any person, or capable of any legacy or deed of gift, or to bear any office for ever within this realm, and shall also suffer imprisonment for the space of three years from the time of such conviction. § 1.

* Repealed by *53 G.* 3. *c.* 160. § 1. *infra.*

Provided, that no person shall be prosecuted by this act for any words spoken, unless the information thereof shall be given upon oath before a justice of the peace, within four days after such words spoken; and the prosecution of such offence be within three months after such information. § 1.

Provided, that any person, convicted of any the aforesaid crimes, shall for the first offence (upon his acknowledgment and renunciation of such offence or erroneous opinions in the same court where he was convicted, within four months after his conviction) be discharged from all penalties and disabilities incurred by such conviction. § 3. (4)

By 53 *G.* 3. *c.* 160. Intituled 'An act to relieve persons who impugn the doctrine of the Holy Trinity from certain penalties,' it is enacted (§ 1.) that 1 *W.* & *M. st.* 1. *c.* 18. § 17. as far as relates to denying the Trinity is repealed. By § 2. Stat. 9 & 10 *W.* 3. *c.* 32. is repealed as far as relates to the same subject. By § 3. acts of *C.* 2. *Sc.* 1. *Parl. c.* 21. and 1 *Parl. W.* 3. *Sc. sess.* 5. *c.* 11. against blasphemy (recited 3 *Meriv. Rep.* 398. *notis*) are repealed. By 57 *G.* 3. *c.* 70. Stat. 6. *G.* 1. *Ir.* 'for exempting the protestant dissenters of Ireland from certain penalties to which they are now subject,' is repealed as far as relates to any penalty or disqua-

(4) The statute 9 & 10 *W.* 3. *c.* 32. does not take away the common law punishment for this offence, but gives a cumulative punishment, and the prosecutor may still proceed either at common law or in the method prescribed by the statute. *The King* v. *Carlile*, 3 *B.* & *A. Rep.* 161.

lification for denying the Trinity, and 53 *G.* 3. *c.* 160. is extended to Ireland.

Profaning the same in stage-plays.

3. By the 3 *J. c.* 21. If any person shall in any stage-play, interlude, shew, make game, or pageant, jestingly or profanely speak, or use the holy name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, which are not to be spoken but with fear and reverence: he shall forfeit 10*l.* half to the king, and half to him that shall sue for the same in any court of record at Westminster.

Nailer's case.

4. In the year 1656, *James Nailer* for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red-hot iron, and to be whipped. and stigmatized in the forehead with the letter B. 1 *St. Tr.* 802.

Curl's case.

5. *M.* 1 *G.* 2. *K.* and *Curl.* An information was exhibited by the attorney-general, against the defendant Edmund Curl, for printing and publishing a certain obscene book, setting forth the several lewd passages, and concluding against the peace. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners, yet it cannot be a libel for which he is punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence; and the defendant was set in the pillory. *Str.* 788.

Woolston's case.

6. *E.* 2 *G.* 2. *K.* and *Woolston.* He was convicted on four informations for his blasphemous discourses on the miracles of our Saviour. And attempting to prove in arrest of judgment, the [217]
court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence punishable in the temporal courts at common law. They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others. *Str.* 834. (5)

Annet's case.

7. *M.* 3 *G.* 3. *K.* and *Peter Annet.* The defendant was convicted on an information, for writing a most blasphemous libel in weekly papers called the Free Inquirer; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being 70 years old, and some symptoms of wildness that appeared on his inspection in court; the court declared, they had mitigated their in-

(5) *Fitzgibb. Rep.* 64. S. C. See *Starkie on Libel*, 495, 496.

tended sentence to the following; viz. To be imprisoned in Newgate for a month; to stand twice in the pillory, with a paper on his forehead, inscribed Blasphemy; to be sent to the house of correction to hard labour for a year; to pay a fine of 6*s*. 8*d*.; and to find security, himself in 100*l*. and two sureties in 50*l*. each, for his good behaviour during life. *Bla. Rep.* 395.

Brother's case. [In 1794, *Richard Brothers*, who had been an officer in the navy, styled himself *Nephew of God*, and pretended that he was a Prince and a Prophet sent to restore the Jews to Jerusalem. He applied many parts of the Revelations to the present times, but predicting in his writings the downfal of monarchy in Europe, the innocence of the prisoners then charged with high treason, the destruction of London, the king, parliament, and British government, he was in March 1795 arrested by a warrant from the secretary of state on suspicion of treasonable practices, and examined before the privy council. Afterwards a commission of lunacy issuing against him, the jury found him a lunatic, and he was confined in a private madhouse. His cause was espoused in the house of commons by a gentleman of great learning, N. B. Halhed, esq.]

Navy. 8. By the 22 *G.* 2. *c.* 33. *art.* 2. All flag officers, and all per- [218] sons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

For profane cursing and swearing, see title **Swearing**.

Heresy is treated of under the title of that name.

Prohibition. (6)

See **Consultation**.

Not grantable in cases merely spiritual. (7) 1. BY the statute of *Circumspecte agatis*, 13 *Ed.* 1. *st.* 4. The king to his judges sendeth greeting. Use yourselves circumspectly *in all matters concerning the bishop of Norwich and his*

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(6) Prohibition is an action founded upon an attachment for a contempt where the defendant proceeds after a writ of prohibition served upon him. *Com. Dig.* tit. *Pleader* (3 H.) The writ may be moved for in Chancery, K.B., C.P., or Exchequer. See *Com. Dig.* tit. *Prohibition* (B).

(7) See *Com. Dig.* tit. *Prohibition*, (G. 1.) *Pleader*, (3 H.) Pro-

clergy, not punishing them if they hold plea in court christian *of such things as be mere spiritual;* that is, to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary, is injoined, specially if a freeman be convict of such things: Also if prelates do punish for leaving the churchyard unclosed, or for that the church is uncovered, or not conveniently decked: in which case none other penance can be injoined but pecuniary: *Item*, if a parson demand of his parishioners oblations or tithes due and accustomed; or if any parson do sue against another parson for tithes greater or smaller, *so that the fourth part of the value of the benefice be not demanded: Item*, if a parson demand mortuaries, in places where a mortuary hath been used to be given: *Item*, if a prelate of a church, or a patron, demand of a parson a pension due to him; all such demands are to be made in a spiritual court, and for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin; and likewise for breaking an oath: In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

In all matters concerning the bishop of Norwich *and his clergy*] The bishop of *Norwich* is here put only for example; but it extendeth to all the bishops within this realm. 2 *Inst.* 487. The said act having been made on petition of the bishop of *Norwich*; [219] as, generally, acts of parliament in ancient times were founded on antecedent petitions.

Of such things as be mere spiritual] Not having any mixture of the temporalties; as heresy, schisms, holy orders, and the like. 2 *Inst.* 488.

So that the fourth part of the value of the benefice be not demanded] So as at this day, in case where one parson of the presentation of one patron demands tithes against another parson of the present-

hibition to stay the consistory court of London from proceeding in a suit where party cited *as* within the jurisdiction of an ecclesiastical court, but resident in another jurisdiction, had appeared and submitted to the suit, was refused, *per* Vice Ch. 4 *Aug.* 1821. 1 *Add. Rep.* 19. (*a*). Whether or not the spiritual court has jurisdiction over a cause depends not on the parties being ecclesiastical persons, but on the nature of the question in dispute: Thus where the right to tithes is admitted, and a question arises between rector and vicar to which of them they are payable, that is a question triable by the spiritual court, and is no subject of prohibition. *Cheeseman* v. *Heby*, *Willes*, 680. *Drake* v. *Taylor*, 1 *Stra.* 87. acc. See *Com. Dig.* tit. *Prohibition* (G. 6.).

ation of another patron in court christian, amounting to a fourth part of the value of the benefice; the right of tithes at this day is to be tried at the common law. 2 *Inst.* 491.

Not for proceeding by the canon law.

2. It hath been holden, that if the spiritual court do proceed wholly on their own canons, they shall not be at all controuled by the common law (unless they act in derogation from it, as by questioning a matter not triable before them, as the bounds of a parish, or the like); for they shall be presumed to be the best judges of their own laws: and therefore in such case, if a person is aggrieved, his proper remedy is not by prohibition, but by appeal, 1 *Haw.* 4. 13. *Ayt. Par.* 171. 438. (8)

Not for trying temporal incidents. (See ante, Courts, 11.)

3. In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (though otherwise of a temporal nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident according to the rules of the temporal law.

Thus in *Shotter* v. *Friend*, *H.* 1 *W.* An executor being sued for a legacy in the spiritual court, pleaded payment, and offered to prove it by one witness; which the judge refused, and gave sentence against him. Upon this matter suggested, a prohibition was moved for. And by the court; 1. Where the ecclesiastical court proceedeth in a matter merely spiritual, if they proceed in their own manner, though it is different from the common law, no prohibition lieth; as in probate of wills, there if they refuse one witness, no prohibition lieth. 2. Where they have cognizance of the original matter, and an incident happens which is of temporal cognizance, or triable by the common law; they shall try the incident, but must try it as the common law would: thus in a suit for tithes, or for a legacy, if the defendant plead a release or payment; or in a suit to prove a will, if the defendant [220] plead a revocation. So in the case at bar: they shall try the matter of payment or no payment, but then they must admit such proof as the common law would, otherwise they reject the cause themselves, and ought to be prohibited. 3. A bare suggestion that the defendant hath but one witness, and that they take exception to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness or not they shall judge, and the party hath no remedy but by appeal. 2 *Salk.* 547. *Ld. Raym.* 220. (9)

Not for a temporal

4. A temporal loss, ensuing upon a spiritual sentence, is not of itself cause of prohibition. So it was adjudged in the 42 & 43

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(8) *Com. Dig.* tit. *Prohibition* (G. 22.). A prohibition does not lie to the spiritual court for proceeding contrary to the canon law, *Bishop of St. David's* v. *Lucy*, 1 *Salk.* 134. 1 *Raym.* 447. 539.

(9) See 3 *Mod.* 283. S. C. *ante* Evidence, 1. and *Com. Dig.* tit. *Prohibition* (G. 23.).

Eliz. in the case of *Baker* and *Rogers* (*Cro. Eliz.* 789.), where the deprivation was for simony; on which occasion the reasoning of the court was thus: Although it was said, that in the spiritual court they ought not to have intermeddled to divest the freehold, which is in the incumbent after induction; true it is, they should not meddle to alter the freehold, but they meddled only with the manner of obtaining his presentment, which by consequence divested the freehold from him, by the dissolution of his estate, when his admission and institution is avoided. In like manner, where an incumbent (*Roberts* v. *Pain*, 3 *Mod.* 67.) was libelled against in the arches, for not being twenty-three years of age when made deacon, nor twenty-four when made priest, and prayed a prohibition, because a temporal loss (namely, deprivation) might follow; the court denied the prohibition, and compared this case to that of a drunkard, or ill liver, who are usually punished in the ecclesiastical courts, though a temporal loss may ensue; and if prohibitions should be granted in all cases where a temporal loss might ensue, those courts would have little or nothing to do. *Gibs.* 1028.

consequential loss.

5. *M.* 1 *Ann. Galizard* and *Rigault.* There was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of *B.* upon which the party was convicted; and afterwards the husband brought an action of trespass, for the same cause; and now the party being also libelled against in the spiritual court for the same fact, namely, for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court. And it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was for the health of the soul, the others for fine and damages. But by the court a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled [221] with force and violence, it doth by reason of the force, which is temporal, become a temporal crime *in toto*, as if one say, Thou art a whore and a thief, or, Thou keepest a bawdy house, which are temporal matters, the party shall not proceed in the spiritual court: so if it be said of a woman that she is a bawd only, and not that she keeps a bawdy house: but *Holt* chief justice said, if one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court, for it is a criminal proceeding there, and no indictment lies at the common law for adultery. 2 *Salk.* 552.

For temporal matters mixt with spiritual.

But if a man libel for two distinct things, the one of which is of ecclesiastical cognizance, and the other not; a prohibition shall be granted as to that which is of temporal cognizance, and they of the court christian shall proceed for the other. *Pense* v. *Prouse*, *Ld. Raym.* 59. (1)

(1) But not after sentence, *comm. semb.* 2 T.R. 473. *Carslake* v.

On trial of customs.

T. H. 10 W. The *Churchwardens* against *The rector of Market Bosworth*. The churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the same parish; and that the rector of the said parish for time out of mind hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The rector in the said court denied the custom. And a decree was made for the rector that there was no such custom, and costs were taxed there for the said rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by *Holt* chief justice; The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath: For in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. (2) And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances [222] of persons may be bound. But in this case, that reason fails: for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom which was well grounded if the custom had not been denied (for libels there may be upon customs), but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of a motion for a prohibition is only to excuse the plaintiffs from costs. And there is no reason but that they ought

Mapledoram, infra. Thus in *Gardner* v. *Parker*, 4 *T. Rep.* 351. where the suit was for breaking open a chest in a church and taking away the title deeds to the advowson, a prohibition was granted; for this is distinguishable from *Welcome* v. *Lake* (*supra* Church, VIII. 24.) where the bells being the goods of the church were in the custody of the churchwardens, who libelled for them, but here only trespass or trover could be maintained.

(2) See *Anon*. 1 *Vent. Rep.* 274. S. P.

to pay them; since it appears that they have vexed the defendant without cause. And therefore a prohibition was denied. *Ld. Raym.* 435. (3)

T. 12 *W. Jones* and *Stone.* David Jones, the vicar of *N.* was libelled against in the spiritual court, for that by custom time out of mind, the vicars of *N.* had by themselves or others, said and performed divine service in the chapel of Chawbury, for which there was such a recompence, and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law. And it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by *Holt* chief justice: A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the spiritual court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied. 2 *Salk.* 550. 1 *Lord Raym.* 578.

[On trial of a modus in tithe suits.]

[Prohibition on trial of a *modus* in tithe suits. See Tithes, IV. 13.]

On the construction of acts of parliament.

7. When the issue of a matter depending in the spiritual court, is determined or influenced by any statute, a prohibition lieth. The reason is, because the temporal judges have the interpretation of all statutes or acts of parliament, whether they concern temporal matters or spiritual.

In some of the books there is an intimation, that not only all statutes whatever are to be interpreted by the temporal courts; but also that when a statute is made, giving remedy in a matter of ecclesiastical cognizance, the very making of such statute doth [223] *ipso facto* take the right of jurisdiction from the spiritual court, and transfer it to the temporal; if there is not a special saving in the act, to preserve the spiritual jurisdiction. But to this the rule laid down by Lord *Coke* (which is also generally followed by the books), is a full answer;—An act of parliament being in the affirmative doth not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as *and not otherwise*, or *in no other manner or form*, or to the like effect. *Gibs.* 1028.

On a refusal of a copy of the libel.

8. *T.* 2 *An.* By *Holt* chief justice: It was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the

(3) See *Dutens* v. *Robson*, ante.

party a copy of the articles; but the law is otherwise, for in such cases, if they refuse to give a copy of the articles, a prohibition shall go until they deliver it; and accordingly, upon motion, a prohibition was granted in the like case by Holt chief justice and the court. *Ld. Raym.* 991. [*Anon. Salk.* 553. *acc.*]

On a collateral surmise. (4)

9. Prohibition may be granted upon a collateral surmise; that is, upon a surmise of some fact or matter not appearing in the libel. It was heretofore a petition of the clergy to the king in parliament, that no prohibition might be granted, without first shewing the libel: and it was a complaint of archbishop Bancroft in the time of king James the first, that prohibitions were granted without sight of the libel, which (as it was there said) is the only rule and direction for the true granting of a prohibition, because upon diligent consideration thereof it will easily appear, whether the cause belong to the temporal or ecclesiastical cognizance; as, on the other side, without sight of the libel, the prohibition must needs range and rove with strange and foreign suggestions, at the will and pleasure of the deviser, nothing pertinent to the matter in demand. To this charge of granting prohibitions without sight of the libel, the judges in their answer say nothing; but as to granting them upon suggestion of matters not contained in the libel, their words are these: Though in the libel there appear no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted; as, where one is sued in the spiritual court for tithes of *sylva cædua*, the party may suggest, that they were gross or great trees, and have a prohibition, yet no such matter appeareth in the libel; so if one be sued there for violent hands laid on a minister by an officer, as a constable,
[224] he may suggest, that the plaintiff made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition: and so in very many other like cases; and yet upon the libel no matter appeareth, why a prohibition should be granted. *Gibs.* 1027. (*i*)

On the husband's suing on the wife's cause of action.

10. *H.* 13 *W.* Libel in the spiritual court by the husband and wife, for calling the husband cuckold: Ruled by *Holt* chief justice, that a prohibition shall go, because they cannot both sue in that court for that word, but the wife only, the imputation being upon her; and the husband and wife by the law spiritual may not join in suit in the ecclesiastical court as they must do in the temporal, but each shall sue separately upon their own cause of action. *Anon.* 3 *Salk.* 288.

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(4) A prohibition cannot be granted on a suggestion which is plainly false in fact, *Smith* v. *Wallet*, 1 *Ld. Raym.* 587. 1 *Salk.* 58. S. C. *Aston* v. *Castle Birmidge, Hob. Rep.* 66.; and though the surmise be matter of fact, and triable by a jury, the court may at discretion refuse it. *Jones* v. *Jones, Hob. Rep.* 185.

(*i*) *Vid.* 2 *Inst.* 607.

11. The suggestion must have been moved, and rejected in the spiritual court, before it can be admitted in the temporal court.—In the bishop of *Winchester*'s case (2 *Co.* 45.) it was held, that in a suit for tithes in the spiritual court, a man may have a prohibition, suggesting a prescription or modus, before or without pleading. But this seems not to be law. For in the 12 *W.* a prohibition was moved for, suggesting a custom. But it was denied by *Holt* chief justice, and the court, unless they pleaded it below, because perhaps they might admit the plea. Also in the 10 *W.* it was said by *Holt* chief justice, that if a modus be pleaded in the spiritual court, and admitted, no prohibition shall go; but if the question be, whether a modus or no modus, a prohibition shall go; and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below (5), before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel. 2 *Salk.* 551. (6)

Suggestion to be first moved in the spiritual court.

12. *M.* 4 *An. Burdett* and *Newell.* A rule was made to shew cause, why a prohibition should not be granted, to stay a suit against the plaintiff, in the court of the archdeacon of Litchfield, for not going to his parish church, nor any other church on sundays or holidays, nor receiving the sacrament thrice a year; upon suggestion of the statute of *Eliz.* and the toleration act, and then qualifying himself within that act; and alleging that he pleaded it below, and that they refused to receive his plea. It was shewn for cause, that this fact was false, and the plaintiff was not a dissenter, nor had qualified himself as above; and [225] therefore it was moved, that the court would not allow the rule to stand, unless they had an affidavit of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction. Which was agreed to by the court, and therefore the rule was discharged. *Ld. Raym.* 1211.

Affidavit to be made of the suggestion.

And by *Holt* chief justice, the distinction is this: Where the matter suggested appears upon the face of the libel, we never

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(5) *Dike* v. *Brown*, 2 *Raym.* 835. *Farresl.* or 7 *Mod.Rep.* 137. 2 *Inst.* 64. *acc. Aliter, comm. semb.* where the spiritual court incidentally determines any matter of common law cognizance otherwise than as common law requires, *Gould* v. *Gapper*, infra 16. *n.*; and though there is a distinction in ecclesiastical practice between the *answer* and the *plea* of a modus, (*Stone* v. *Harwood, Rep. t. Hardw.* 357. *Broughton* v. *Hustler*, 10 *East*, 349. *Gwill.* 951) an affidavit "that defendant had answered on oath *or* pleaded," such *modus* was held sufficient to found a prohibition; for it appeared that there was nothing to try in the court below but the *modus* insisted on in defendant's answer.

(6) Thus it cannot be granted on process before libel and appearance, *Transer* v. *Watson*, 1 *Salk.* 35. 2 *Ld. Raym.* 321. S. C. See *Dutens* v. *Robson*.

insist upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of the suggestion. 2 *Salk.* 549. (*k*)

Strict proof of the suggestion not necessary.

13. It is said, the suggestion need not be precisely proved, in order to obtain a prohibition. For where the suggestion was for a modus for lamb and wool, though the proof failed as to the wool, and it was urged that therefore they had failed in the whole; yet a prohibition was granted. And in the case of *Austen* and *Pigot*, it was said, that the proof in a prohibition need not to be so precise, but if it appears that the court christian ought not to hold plea thereof, it sufficeth. *Gibs.* 1029. (*l*)

But if the suggestion appears to the court to be notoriously false, they will not grant a prohibition; for by *Holt* chief justice, they ought to examine into the truth of the suggestion, and see what foundation it hath. *L. Raym.* 587.

Suggestion traversable.

14. Lord *Coke* says, the suggestion for a prohibition may be traversed in the temporal court. 2 *Inst.* 611.

And Dr. *Watson* says, if the suggestion for a prohibition contains no other matter upon which a prohibition ought to be granted to the spiritual court, besides the refusal of a plea there, which by the common law is a good plea, and ought to have been allowed, in such case the refusal is traversable. Therefore supposing that a *modus decimandi*, or a prescription of a manner [226] of tithing is triable in the spiritual court; if in a suit there for a *modus decimandi* another modus be pleaded, or that there is no such modus, and that plea is refused; or if in a suit for tithes of lands not tithe-free, a prescription is pleaded as to the manner of tithing, and that plea is refused; and a prohibition is moved for, upon suggestion of such refusal; the refusal being the principal matter of the suggestion, is therefore traversable. *Wats. c.* 57. *in fine.* (*m*)

Not on the last day of the term.

15. Prohibitions are not to be granted on the last day of the term. So is the rule set down in the books: to which Rolle adds, nor on the last day save one: and the reason of both is, that there would not be time for notice to be given to the other side. But it is added in *Latch.* that upon motion, on the last

(*k*) Where it is necessary to suggest a particular fact to the court, as a custom, it must be verified by affidavit. *Caton* v. *Burton*, *Cowp.* 330.

(*l*) *Austen* v. *Pigot*, *Cro. Eliz.* 736. For the court will refuse a consultation if any modus be found, though different from that laid. But, at the same time, if the modus be not proved as laid by the plaintiff in prohibition, there must be a verdict for the defendant, who is entitled to costs. *Brock* v. *Richardson*, 1 *T. Rep.* 427.

(*m*) *Vide* also *Peters* v. *Prideaux*, 3 *Keb.* 332.

day of the term, there may be a rule to stay proceedings till the next term. *Gibs.* 1029. (7)

16. *T.* 10 *W. Gardner* and *Booth.* Where it doth appear in the libel, or by the proceedings in the cause, that the cognizance of the cause doth not belong to the spiritual court; a prohibition may be moved for and granted after sentence; and this holds in all cases but where one is sued out of his diocese; for there, if he doth not take advantage of it before sentence, he shall not have a prohibition after sentence; and the reason is, for that the cause doth belong to the spiritual court; and though it doth not belong to that spiritual court, it belongs to some other, and not to the king's temporal court. 2 *Salk.* 548. **May be after sentence.**

So in the case of *Parker* and *Clarke*, *M.* 3 *An.* The clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then and not before it had been proper to move for a prohibition. But by *Holt* chief justice; It is never too late to move the king's bench for a prohibition, where the spiritual court hath no original jurisdiction, as they had not in this case, because the clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, [227] and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens, for neglecting to make a rate, and to levy it, or if it had been levied, and not paid by them to the plaintiff. 6 *Mod.* 252. 3 *Salk* 87. (8)

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(7) *Latch.* 7. 2 *Roll. Rep.* 456. And in one case it was granted on the last day, leave having been got the day before to move it then. *Catchside* v. *Ovington*, 3 *Burr.* 1922.

(8) A prohibition cannot be had *after* sentence, *unless the want of jurisdiction in the court below appear on the face of the proceedings in it.* *Argyle* v. *Hunt*, *Stra.* 187. *Blaquiere* v. *Hawkins*, *Doug.* 378. *Ladbroke* v. *Cricket*, 2 *T. Rep.* 649. But if it appear on the face of the proceedings that the court has exceeded its jurisdiction, a prohibition will be granted even *after* sentence. *Symes* v. *Symes*, 2 *Burr. Rep.* 813. *Buggin* v. *Bennett*, 4 *id.* 2035. *Catchside* v. *Ovington*, 3 *id.* 1923. and see *Com. Dig.* tit. *Prohibition* (D). Thus the consistorial court of the bishop of Norwich having ordered certain churchwardens to deliver in their accounts, but having afterwards examined the account and struck a balance, which they refusing to pay, the judge pronounced them contumacious, and excommunicated them; the court of king's bench being moved for a prohibition, granted it; for

Plaintiff may have a prohibition.

17. The plaintiff, as well as defendant, in the spiritual court, may have a prohibition to stay his own suit. To this purpose,

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the ecclesiastical court may compel churchwardens to deliver in their accounts, but cannot proceed to examine the different articles. *Leman* v. *Goulty*, 3 *T. Rep.* 3. And where the plaintiff in prohibition properly pleaded a modus to a suit for tithes in the ecclesiastical court of the dean of the cathedral church of Sarum; but the judge of the court by an interlocutory sentence decreed him to answer more fully, from which sentence he appealed, and his appeal was dismissed with costs. The court of king's bench granted a prohibition to both courts, in order to stay execution for the costs; for the sentence was not *final;* and it also appeared on the face of the proceedings that the jurisdiction of the ecclesiastical court ceased when the modus was pleaded, and could not recommence till there was a verdict for the defendant, and a consultation awarded. *Darby* v. *Cosens*, 1 *T. Rep.* 552. 1 *Dougl.* 378. *n.* But the rule lastly abovementioned is applicable to those cases only *where prohibitions are granted for want of original jurisdiction in the courts below*, and not to those cases *where they may be had if duly applied for, on account of a defect of trial.* For where a matter collateral and incidental to a suit arises, which is properly triable at common law as a *modus*, though the courts of common law would have granted a prohibition before sentence on account of the defect of trial in the ecclesiastical court, they will not grant it after sentence if the defendant there pleaded the modus, and submitted to the trial of it; for by so doing he has waived the benefit of a trial at common law, *Full* v. *Hutchins*, *Cowp.* 422. Other cases cited *arguendo*, 5 *East*, 348. So where it did not appear *on the face of the proceedings* that the fact of boundary of parish (for trial of which prohibition was moved) was *denied or in issue below*, *Stainbank* v. *Bradshaw*, 10 *East*, 349. And to oust the ecclesiastical court of its jurisdiction it is not enough that a custom or prescription be stated, except it be denied by the other side, and the court are proceeding to try it: for it may be immaterial to the question. *Dutens* v. *Robson*, 1 *H. Bla.* 100. See *Jones* v. *Stone*, ante, 6. But after a decision for the rector in a suit for tithes in the archidiaconal court, the defendant below applied for a prohibition on the ground of misconstruction of an act of parliament, on which as a matter of common law cognizance *incident* to the suit, that court had determined the case. The court of K. B. directed plaintiff to declare in prohibition for the more solemn adjudication of the question, 'Whether, supposing the court below to have misconstrued the act, a 'prohibition should go *after* sentence in a matter in which the court 'below had original jurisdiction, or whether it was only a ground of 'appeal?' *Gare* and *Gould* v. *Gapper*, 3 *East Rep.* 472.; and afterwards, on demurrer to the declaration, the whole law of prohibition *before* and after sentence having been ably discussed, the Court held that where the spiritual court *incidentally* determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies *after* sentence, although the objection *does not appear on the face of the libel but is collected from the whole of the proceedings below*, *Gould*

when archbishop Bancroft alleged that the plaintiff's having made choice thereof, and brought his adversary there into trial, should by all intendment of law and reason, and by the usage of all other judicial places, thereby conclude himself in that behalf; yet the answer of the judges was, that none may pursue in the ecclesiastical court, for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertaineth not to their own jurisdiction. (*n*) And in the case of *Worts* and *Clyston*, *M.* 12 *Ja.* the same thing was declared and adjudged in the court of king's bench. *Gibs.* 1027. *Cro. J.* 350.

E. 30 *G.* 2. *Paxton* and *Knight*. This was a question whether a prohibition should be granted, to stay proceedings in an ecclesiastical court, in a suit by a quaker, for a seat in a church; founding his title upon a prescriptive right. In which suit the ecclesiastical court had determined against him. And now he came, after sentence below, for a prohibition. (Note, an immemorial prescription was alleged on both sides.) On shewing cause against the prohibition, it was urged, that the court will not, after sentence, grant a prohibition, unless the defect of jurisdiction appears upon the face of the libel. And the aforesaid case of *Market Bosworth* was insisted on, where the spiritual court had adjudged against the custom set up; though their law allows a less time, than the common law, to make a custom: but the prohibition was denied. So here, if the spiritual court will admit less evidence of a prescription than the temporal courts will, and the prescription is nevertheless found to be groundless; it is certain that the party who sets it up can have no reason to come for a prohibition after sentence: and his only reason for it can be (as the court observed in the aforesaid case) to get clear of those costs, which he hath by his own vexatious suit rendered himself liable to, and which (as was there adjudged) he ought to pay.—But the court seemed to think, that if the sentence of the ecclesiastical court was a nullity, their award of costs must be so too. And here are reciprocal prescriptions alleged. And the prescriptive right of the one is determined [229] *for*, though that of the other is determined *against*. They have adjudged the adverse prescription to be a good one, which they could not try, and which they will establish upon less evidence

v. *Gapper*, 5 *East Rep.* 345. Again, no prohibition will be granted to a spiritual court *after* sentence on a libel for certain words spoken of a woman which were not actionable at law unless accompanied by special damage. So if that court has cognizance of part of the charge only and not the rest *Carslake* v. *Mapledoram*, 2 *T. Rep.* 473.

(*n*) 2 *Inst.* 607.

than the common law requires. And lord *Mansfield* said, that though he was very sorry that the court were obliged to grant the prohibition (because the party applied for it only to get rid of paying the costs occasioned by his own vexatious suit), yet he thought they could not avoid doing it. And the rule for a prohibition was made absolute. 1 *Burr. Rep.* 314.

Party dying. 18. If the defendant in a prohibition die; his executors may proceed in the spiritual court, and the judges of that court, out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed: but the plaintiff may, if he pleaseth, have a new prohibition against the executors. *Wats. c.* 55.

Costs. (Plaintiff.) 19. A prohibition takes off the costs assessed upon an appeal, where the cause is returned to the inferior court. This was adjudged *E.* 7 *Cha.* in the case of *Crompton* and *Waterford*; where an appeal had been to the delegates, who overruled it, and assessed costs for the wrong appeal: And the court agreed with Richardson, that because a prohibition stays all proceedings, the costs were taken away; and added, that if the party was excommunicate, he should be absolved. *Hetl.* 167. *Litt.* 365. *Gibs.* 1029.

By the statute of the 8 & 9 *W. c.* 11. In suits upon prohibitions, the *plaintiff obtaining judgment* or any award of execution, after plea pleaded, *or demurrer* (9) joined therein, *shall recover his costs of suit*; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the *defendant shall recover his costs*, and have execution for the same. § 3. (1)

H. 4 *G.* Sir *Henry Houghton* and *Starkey*. After judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed; and whether they should be computed from the first motion, or only from the declaration, was the doubt. Upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances; the one in the case of *Eads* and *Jackson* in the 2 *Geo.*, and the other in the case of *Brown* and *Turner*; where they were allowed from the first motion. And of this opinion were all the judges. And all the officers were directed for the future to allow the costs of the first motion. And afterwards, *H.* 12 *Geo.* between *Swetnam* and *Archer*, it was stated in the same manner, and agreed to be
[230] the uniform practice ever since. And *E.* 1 *G.* 2. between Sir *Thomas Bury* and *Cross*, the same doubt was raised by a new

(9) Thus *semb.* if *defendant* succeed on demurrer, *he* has no costs, *Brymer* v. *Atkyns*, *H.* 22 *G.* 3. C.P. *Tidd.* 7th *ed.* 961.

(1) For the statute of Glocester, 6 *Ed.* 1. *c.* 1: *s* 2. does not extend to cases when the crown is prosecutor as in prohibition, *Comb.* 20.

master; and the court ordered costs from the first motion. *Str.* 82. [See *Cas. Pr.* C. P. 11.]

M. 10 *G.* 2. *Middleton* and *Croft.* The plaintiff in prohibition, having prevailed in one point, although he failed in all the rest, moved for costs, and it was moved that they might be taxed from the time of the first motion, according to several determinations. And this last was acquiesced in, if the court should be of opinion for costs. As to which it was objected, that the point in which the plaintiff prevailed was not the gist of the proceedings, but only a circumstance; and that it would be very hard, that they who had prevailed upon the merits should pay costs. But by the court, The words of the act are not to be got over, which give costs to the plaintiff, if he obtains any judgment: and this matter was under consideration in the house of lords in Dr. *Bentley's* case, where the prohibition stood as to some articles, and there was a consultation for the rest: to be sure it will be considered in the quantum, but we cannot deny costs. *Str.* 1062. (2)

H. 14. *G.* 2. *Gegge* and *Jones.* Upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so get the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. *Str.* 1114.

[Costs (Defendant.)]

[Where defendant pleaded nothing to the merits but only that he did not proceed in the spiritual court after the prohibition, the court ordered the defendant to pay plaintiff's costs of proceeding in prohibition. (3) Where defendant in prohibition lets judgment go by default, plaintiff is entitled by common law to a writ to inquire of his *damages* for the contempt in proceeding after the prohibition delivered: and of consequence by the stat. *Glocester*, to his costs (4), but not *in this case from the first motion*, but only from the time that the rule for a prohibition was made absolute, as defendant could not possibly be in contempt before. (5) And where plaintiff was nonsuited, it was holden that defendant ought only to have the costs of the nonsuit, and not those incurred by opposing the rule to shew cause why the writ of prohibition should not be granted. (6)]

[By proviso in § 5. the statute shall not extend to executors or

(2) So if defendant prevail as to *part* he shall have costs, *Barnes, Ca. Pr.* 138, 139.

(3) *Barnes*, 148.

(4) *Cas. Pr.* C.P. 20.

(5) *Cas. Pr.* C.P. 21.

(6) *Saycr's* Costs, 137.

administrators: and hence it has been determined that in prohibition they are not liable to payment of costs though defendants, and defeated on demurrer. (7)]

Conclusion. 20. To conclude, Sir *Simon Degge* observeth, that prohibitions of themselves are excellent things, where they are used upon just, legal, and true grounds; and have often avoided the usurpations of the popes and spiritual courts. But by the corruption of these latter times, they are grown very grievous to the clergy (in the recovering of their tithes and other rights), being too often granted upon feigned and untrue suggestions, which it is impossible the judges should foresee without the spirit of prophecy. And (he adds) I think I may presume to say, that where one was granted before queen Elizabeth's time, there have been a hundred granted in this last age. And they are a very great delay and charge to the clergy; and it were well (says he) in my poor judgment, if the reverend judges would think of some way to restrain them, or to make them pay well for their delay, by making
[231] the plaintiff enter into recognizance to pay such costs as the court out of which they issue should award, in case they should not prove their suggestion in convenient time: or some such other course as they in their great wisdom shall think just and meet. *Deg. p.* 2. *c.* 26. (*o*)

Note, *Consultation* is treated of under the title of that name.

Provisors. See Courts.
Psalmody. See Public worship.
Public Notary. See Notary Public.

(7) *Scammell* and Others v. *Wilkinson* and Another, 3 *East*, 202.

(*o*) The practice of the courts of common law, in granting prohibitions, was seriously complained of in the reign of James I. by archbishop Bancroft, who in the name of the whole clergy exhibited to the privy council against the judges, "certain articles of abuses "which were desired to be reformed in granting of prohibitions;" but his objections were fully answered by them. 2 *Inst.* 601. If a prohibition be improperly obtained by an untrue suggestion, a consultation will be awarded, which remits the cause to the proper jurisdiction; see Consultation. And in *Searle's* case, the judges said, "it is a rule not to grant a prohibition where the proceedings in "ecclesiastical courts are not against the law of the land and the "liberty of the subject." *Cro. Jac.* 481. For according to Mr. *J. Blackstone*, as on the one hand the courts of Westminster lend the ecclesiastical courts a parental assistance in aiding the compulsive powers of their jurisdiction; so on the other they are obliged sometimes to exercise a parental authority by restraining those powers within their proper limits. Vol. 3. *p.* 103. For the form of pleadings on a writ of prohibition, see *Soby* v. *Molins*, *Plowd.* 468.

Public worship.

I. *Due attendance on the public worship.*
II. *Establishment of the book of common prayer.*
III. *Orderly behaviour during the divine service.*
IV. *Performance of the divine service, in the several parts thereof.*

I. *Due attendance on the public worship.* (8)

1. *Can.* 90. THE churchwardens or questmen of every parish, and two or three more discreet persons to be chosen for sidesmen or assistants, shall diligently see that all the parishioners duly resort to their church upon all Sundays and holidays, and there continue the whole time of divine service: and all such as shall be found slack or negligent in resorting to the church (having no great or urgent cause of absence) they shall earnestly call upon them; and after due monition (if they amend not,) they shall present them to the ordinary of the place. **All persons shall resort to church.**

2. By the 5 & 6 *Ed.* 6. *c.* 1. [§ 2. and 1 *El. c.* 2. § 14.] All persons shall diligently and faithfully (*having no lawful or reasonable excuse* to be absent) endeavour themselves to resort *to their parish church* or chapel accustomed, *or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let,* upon every Sunday and other days ordained and used to be kept as holidays; and then and there to abide orderly and soberly during the time of the common prayer, preaching, or other service of God: on pain of punishment by the censures of the church [and of 12*d.* per Sunday, 1 *El. c.* 2. § 14. only, see Dissenters, I. 2.] **On pain of punishment by the censures of the church.**

And for the due execution hereof; the king's most excellent majesty, the lords temporal, and all the commons in this present parliament assembled, do in God's name require and charge all the archbishops, bishops, and other ordinaries, that they shall endeavour themselves to the utmost of their knowledges, that the due and true execution thereof may be had throughout their dioceses and charges, as they will answer before God for such evils and plagues wherewith Almighty God may justly punish his people, for neglecting this good and wholesome law. § 3.

3. By the 1 *El. c.* 2. *All persons* shall diligently and faithfully, *having no lawful or reasonable excuse* to be absent, endeavour themselves to resort *to their parish church* or chapel accustomed, **On pain of 12*d.* a Sunday.**

(8) See these acts more fully treated, Dissenters, I. 2. Holidays, 4. Popery, XV.

or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used, in such time of let, upon every Sunday, and other days ordained and used to be kept as holidays, *and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God* there to be used and ministered; on pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12*d.* to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods and lands of such offender by way of distress. § 14.

All persons] Femes covert as well as others. *Gibs.* 291.

Except dissenters qualified by the act of toleration, who resort to some congregation of religious worship allowed by that act. 1 *W. c.* 18. § 2. 16. [And persons who shall take the oaths and come to some congregation or place of religious worship permitted to Roman catholics by 31 *G.* 3. *c.* 32. § 9.]

But they who repair to no place of public worship, are still punishable as before that act [or the 31 *G.* 3. *c.* 32.] And if the churchwardens shall happen to present a person, who possibly may go to some other place; the proof thereof rests upon the person presented, and the absence from church justifies the presentment. *Gibs.* 964.

Having no lawful or reasonable excuse] In the case of *Elizabeth Dormer*, an exception was taken to the indictment, because these words were omitted, *not having any lawful or reasonable excuse;* but it was agreed by all, that these words are to come in on the other side, and need not be put into the indictment. *Gibs.* 291.

To their parish church] If one goes to a customary chapel within the parish, it is a good excuse; but this must be pleaded. *Gibs.* 292.

If the plea in the spiritual court be, that this is not his parish church, and they refuse the plea, a prohibition will be granted: because that court cannot intermeddle with the precincts of parishes. *Gibs.* 292.

Or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let] By the common law or practice of the church of England, no person can be duly discharged from attending his own parish church, or warranted in resorting to another, unless he be first duly licensed by his ordinary, who is the proper judge of the reason-
[234] ableness of his request, and grants him letters of licence under seal, to be exhibited (as there shall be occasion) in proof of his discharge. Which licences are very common in our ecclesiastical records. *Gibs.* 291.

And there to abide orderly and soberly] It is not enough to come, unless he also abide; nor enough to abide when he is

come, unless he come so as to be present at the several parts of divine service, and also remain there throughout orderly and soberly: the clause being penned conjunctively, and so the guilt and forfeiture incurred by the violation of any one branch. *Gibs.* 292.

Among the constitutions of Egbert, archbishop of York, one is, that whilst the minister is officiating, if any person shall go out of the church, he shall be excommunicated; and this is taken from a canon of the fourth council of Carthage. *Gibs.* 964.

[No man shall be molested for any of the above offences, except he be indicted at the next general sessions of oyer and terminer or of assize, held next after any offence committed. 5 & 6 *Ed.* 6. *c.* 1. § 9. 1 *El. c.* 2. § 20.]

And all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have power to inquire hereof in their visitation, synods, and elsewhere within their jurisdiction, at any other time and place, and to take accusation, and informations of all and every the things above mentioned, done, committed, or perpetrated within the limits of their jurisdictions; and to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the queen's ecclesiastical law. § 23.

And the justices of assize shall have power to inquire of, hear and determine the same at the next assizes; and to make process for execution, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. And every archbishop and bishop may at his liberty and pleasure join and associate himself to the justices of assize, for the inquiring of, hearing, and determining the same. § 17, 18, 19.

And all mayors, bailiffs, and other head officers, of cities, boroughs, and towns corporate to which justices of assize do not commonly repair, shall have power to inquire of, hear and determine the same yearly within fifteen days after the feast of Easter and St. Michael the archangel; in like manner and form as the justices of assize may do. § 22.

Also by the 3 *J. c.* 4. If any subject of this realm shall not repair every Sunday to some church, chapel, or usual place appointed for common prayer, and there hear divine service, according to the said statute of the 1 *El. c.* 2., it shall be lawful for one justice of the peace, on proof to him made by confession or oath of witness, to call the party before him; and if he shall not make a sufficient excuse and due proof thereof to the satisfaction [235] of such justice, he shall give warrant to the churchwarden of the parish where the party shall dwell, to levy 12*d.* for every such default by distress and sale: and in default of distress, shall com-

mit him to prison till payment be made: which forfeiture shall be to the use of the poor of the parish where the offender shall be resident at the time of the offence committed. Provided, that no man be impeached upon this clause, except he be called in question for his said default within one month next after the default made: And that no man being punished according to this branch, shall for the same offence be punished by the forfeiture of 12*d.* on the statute of the first of *Elizabeth.* § 27, 28, 29.

And provided, that whatsoever persons shall for their offences first receive punishment of the ordinary, having a testimonial thereof under the ordinary seal, shall not for the same offence eftsoons be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence eftsoons receive punishment of the ordinary. 1 *El.* *c.* 2. § 24.

On pain of 20*l.* a month.

4. *By the* 23 *El.* *c.* 1. § 5. Every person above the age of sixteen years, which shall not repair to some church, chapel, or usual place of common prayer, but forbear the same contrary to the 1 *El.* *c.* 2., and be thereof lawfully convicted, shall forfeit to the queen 20*l.* a month.

And there are many regulations concerning the same, by that, and by several subsequent statutes; which being chiefly intended against popish recusants, are more properly treated of under the title Popery XV. And by the toleration act, the same shall not extend to qualified protestant dissenters: See Dissenters, I. 2. But no papist, or popish recusant, shall have any benefit by the said act of toleration. [But by the 31 *G.* 3. *c.* 32. Roman catholics who shall take the oath and subscribe the declaration thereby prescribed, are exempted from several penalties to which they were before subject; for which see title Popery.]

And by the 23 *El.* *c.* 1. Every person which usually on the Sunday shall have in his house divine service which is established by the law of this realm, and be thereat himself usually or most commonly present, and shall not obstinately refuse to come to church: and shall also four times in the year at least be present at the divine service in the church of the parish where he shall be resident, or in some other common church or chapel of ease, shall not incur the said penalty of 20*l.* a month for not repairing to church. § 12.

[By 31 *G.* 3. *c.* 32. § 9. all laws made for frequenting divine service on Sundays are confirmed unless such persons frequent a legal dissenting congregation.]

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On pain of being disabled from offices.

5. *By the* 3 *J.* *c.* 5. No recusant convict shall practise law or physic, nor shall be judge or minister of any court, or bear any military office by land or sea: and shall forfeit for every offence 100*l.*: and shall also be disabled to be executor, administrator, or guardian. § 8. 22.

6. *By the* 3 *J. c.* 4. Every person who shall retain in his service, or shall relieve, keep, or harbour in his house any servant, sojourner, or stranger, who shall not repair to church, but shall forbear for a month together, not having reasonable excuse, shall forfeit 10*l.* for every month he shall continue in his house such person so forbearing: And the justices of the peace in their sessions may hear and determine the same. § 32, 33. 36.

Penalty of harbouring such recusant.

7. *But by the* 1 *J.* c. 4. A recusant conforming himself shall be discharged of all penalties, which he might otherwise sustain by reason of his recusancy. § 2. (*p*)

Recusant conforming.

II. *Establishment of the book of common prayer.*

1. *Art.* 20. The church hath power to decree rites, or ceremonies, that are not contrary to God's word.

Power of the church to decree rites and ceremonies.

Art. 34. It is not necessary that traditions and ceremonies be in all places one, or utterly like; for at all times they have been divers, and may be changed according to the diversity of countries, times, and men's manners; so that nothing be ordained against God's word. Whosoever through his private judgment, willingly and purposely doth openly break the traditions and ceremonies of the church, which be not repugnant to the word of God, and be ordained and approved by common authority; ought to be rebuked openly (that other may fear to do the like), as he that offendeth against the common order of the church, and hurteth the authority of the magistrate, and woundeth the consciences of weak brethren. Every particular or national church, hath authority to ordain, change, and abolish ceremonies or rites of the church, ordained only by man's authority; so that all things be done to edifying.

Can. 6. Whoever shall affirm, that the rites and ceremonies of the church of England by law established, are wicked, antichristian, or superstitious; or such as, being commanded by lawful authority, men who are zealously and godly affected may not with any good conscience approve them, use them, or as [237]
occasion requireth subscribe unto them: let him be excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked errors.

2. In the more early ages of the church, every bishop had a power to form a liturgy for his own diocese; and if he kept to the analogy of faith and doctrine, all circumstances were left to his own discretion. Afterwards the practice was for the whole province to follow the service of the metropolitan church; which also became the general rule of the church: And this Lindwood

Liturgy before the acts of uniformity.

(*p*) In what respects these acts are mitigated, see *titles* Dissenters, Popery.

acknowledgeth to be the common law of the church: and intimates, that the use of several services in the same province (as was here in England) was not to be warranted but by long custom. *Gibs.* 259.

The Latin services, as they had been used in England before, continued in all king Henry the eighth's reign, without any alteration: save some rasures of collects for the pope, and for the office of Thomas Becket and of some other saints, whose days were by the king's injunctions no more to be observed: but those rasures or deletions were so few, that the old mass books, breviaries, and other rituals, did still serve without new impressions. *Gibs.* 259.

Act of uniformity of the 2 E. 6.

3. In the second year of king Edward the sixth, *a liturgy* was established by the statute of the *2 & 3 Ed. 6. c. 1.* as followeth:

Where of long time there hath been had in this realm of *England* and in *Wales*, divers forms of common prayer, commonly called the service of the church, that is to say, the use of *Sarum*, of *York*, of *Bangor*, and of *Lincoln*; and besides the same, now of late much more divers and sundry forms and fashions have been used in the cathedral and parish churches of *England* and *Wales*, as well concerning the matins or morning prayer, and the evensong, as also concerning the holy communion commonly called the mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of other sacraments of the church; and albeit the king, by the advice of his council, hath hitherto divers times assayed to stay innovations or new rites concerning the premises, yet the same hath not had such good success as his highness required in that behalf; whereupon his highness being pleased to bear with the frailty and weakness of his subjects in that behalf; of his great clemency hath not only been content to abstain from punishment of those that have offended in that behalf, but also to the intent a uniform, quiet, and godly order should be had concerning the pre-
[238] mises, hath appointed the archbishop of *Canterbury*, and certain other of the most learned and discreet bishops and other learned men of this realm, having respect to the most sincere and pure christian religion taught by the scripture, as to the usages in the primitive church to draw and make one convenient and meet order, rite, and fashion of common and open prayer and administration of the sacraments to be had and used in his majesty's realm of *England* and in *Wales*; the which, by the aid of the Holy Ghost, with one uniform agreement is of them concluded, set forth and delivered in a book entitled, "*The book of common prayer and administration of the sacraments and other rites and ceremonies of the church, after the use of the church of England.*" Wherefore the lords spiritual and temporal, and the commons, in this present parliament assembled, considering as well the

most godly travel of the king's highness herein, as the godly prayers, orders, rites, and ceremonies in the said book mentioned, and the considerations of altering those things which be altered, and retaining those things which be received in the said book, and also the honour of God, and great quietness which by the grace of God shall ensue upon the one and uniform rite and order in such common prayer and rites and external ceremonies to be used throughout England and Wales, do give to his highness most hearty and lowly thanks for the same, and humbly pray that it may be enacted by his majesty with the assent of the lords and commons in parliament assembled, That all and singular ministers in any cathedral or parish church, or other place within this realm, shall be bounden to say and use the mattens, evensong, celebration of the Lord's supper commonly called the mass, and administration of each the sacraments, and all their common and open prayer, in such order and form as is mentioned in the same book, and none other, or otherwise.

And by the same act divers regulations were made, to establish the said book; which are yet in force, not for the establishment of that book, but for the establishment of the present book of common prayer injoined by the act of uniformity of the 13 & 14 *C.*2. and which therefore remain to be inserted in their due course. For, that I may observe it once for all; the regulations made by the several acts of uniformity for the establishing of the several respective liturgies, are all brought over and inforced by the last act of uniformity for the establishing of the present book of common prayer, by this clause following, viz.

The several good laws and statutes of this realm, which have been formerly made, and are now in force, for the uniformity of prayer and administration of the sacraments, shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book hereinbefore [239]
mentioned to be joined and annexed to this act; and shall be applied, practised, and put in ure for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other. 13 & 14 *C.*2. *c.* 4. § 24.

And by the 3 *&* 4 *Ed.*6. *c.*10. All books called antiphoners, missals, grailes, processionals, manuals, legends, pies, portuasses, primers in Latin and English, couchers, journals, ordinals, or other books of writings whatsoever heretofore used for the service of the church, written or printed in the English or Latin tongue, other than such as shall be set forth by the king's majesty, shall be clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm or elsewhere in any of the king's dominions. § 1.

And if any person or persons, bodies politic or corporate, that shall have in his or their custody any the books or writings of

the sorts aforesaid, and do not before the last day of June next ensuing, deliver or cause to be delivered, all and every the same books to the mayor, bailiff, constable, or churchwardens of the town where such books then shall be, (to be by them delivered over openly within three months next following after the said delivery, to the archbishop, bishop, chancellor, or commissary of the same diocese, to the intent that they cause them immediately after either to be openly burned, or otherwise defaced and destroyed:) he shall for every such book or books willingly retained in hands or custody, and not delivered as aforesaid after the said last day of June, and be thereof lawfully convict, forfeit to the king for the first offence 20*s*., and for the second offence 4*l*., and for the third offence shall suffer imprisonment at the king's will. § 2.

And if any mayors, bailiffs, constables, or others, do not within three months after receipt of the same books, deliver or cause to be delivered such books so by them received, to the archbishop, bishop, chancellor, or commissaries of their diocese; and if the said archbishop, bishop, chancellor, or commissaries do not within forty days after the receipt of such books, burn, deface, and destroy, or cause to be burned, defaced, or destroyed the same books, and every of them; they and every of them so offending shall forfeit to the king, being thereof lawfully convict, 40*l*. The one half of all which forfeitures shall be to any of the king's subjects that will sue for the same in any of the king's courts of record. § 3.

And as well justices of assize in their circuits, as justices of the peace within the limits of their commission in the general sessions, shall have power to inquire of, hear, and determine the same; in such form as they may do in other such like cases. § 4.

[240] Provided, that any person may use, keep, and have any primers in the English or Latin tongue, set forth by king Henry the eighth; so that the sentences of invocation or prayer to saints in the same primers be blotted, or clearly put out of the same. § 6.

Act of uniformity of the 5 Ed. 6.

4. Thus stood the liturgy until the 5th year of king Edward the sixth. But because some things were contained in that liturgy, which shewed a compliance with the superstition of those times, and some exceptions were taken to it by some learned men at home, and by Calvin abroad, therefore it was reviewed, in which Martin Bucer was consulted, and some alterations were made in it, which consisted in adding the general confession and absolution; and the communion to begin with the ten commandments. The use of oil in confirmation and extreme unction were left out, and also prayers for souls departed, and what tended to a belief of Christ's real presence in the eucharist. And this liturgy, so reformed, was established by the act of the 5 *Ed.* 6. as

followeth: — Because there hath risen in the use and exercise of common service in the church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the minister and mistakers, than of any other worthy cause: therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, the king, with the assent of the lords and commons in parliament assembled, hath caused the aforesaid order of common service, intitled the book of common prayer, to be faithfully and godly perused, explained, and made fully perfect, and hath annexed and joined it so explained and perfected to this statute: adding also, a form and manner of making and consecrating of archbishops, bishops, priests, and deacons, to be of like force, authority, and value, as the same like aforesaid book intitled the book of common prayer was before; and with the same clauses of provisions and exceptions to all intents and purpsoes as by the act of the 2 & 3 *Ed.* 6. *c.* 1. was limited and expressed for the uniformity of service and administration of the sacraments throughout the realm, upon such several pains as in the said act is expressed. And the said former act to stand in full force and strength to all intents and constructions, and to be applied, practised, and put in ure to and for the establishing of the book of common prayer now explained and hereunto annexed, and also the said form of making archbishops, bishops, priests, and deacons hereunto annexed, as it was for the former book. 5 & 6 *Ed.* 6. *c.* 1. § 5.

This liturgy was abolished by queen Mary; who having called in and destroyed the aforesaid rased books of king Henry the [241] eighth, required all parishes to furnish themselves with new complete books, and enacted that the service should stand as it was most commonly used in the last year of the reign of the said king Henry the eighth. *Gibs.* 259.

And for a month or more after queen Mary's death, the service continued as before, nothing being forbidden but the elevation; but on the 27th day of December following, queen Elizabeth set forth a proclamation, to charge and command all manner of her subjects, as well those that be called to the ministry of the church, as all others, that they do forbear to preach or teach, or to give audience to any manner of doctrine or preaching, other than to the gospels and epistles, commonly called the gospel and epistle of the day, and to the ten commandments in the vulgar tongue, without exposition or addition of any manner of sense or meaning to be applied or added; or to use any other manner of public prayer, rite, or ceremony in the church, but that which is already used, and by law received, or the common litany used at this present in her majesty's own chapel, and the Lord's prayer and the creed in English; until consultation may be had by par-

liament, by her majesty and her three estates of this realm, for the better conciliation and accord of such causes, as at this present are moved in matters and ceremonies of religion. *Gibs.* 267, 268.

Act of uniformity of the 1 Eliz.

5. After which, in the first year of the same queen, a liturgy was established by act of parliament of the 1 *El. c.*2. in this wise:—Be it enacted, by the queen's highness, with the assent *of the lords and commons* in this present parliament assembled, that all ministers in any cathedral or parish church, or other place, shall be bounden to say and use the mattens, evensong, celebration of the Lord's supper, and administration of each of the sacraments, and all the common and open prayer, in such order and form as is mentioned in the book authorized by parliament in the 5 & 6 *Ed.* 6. with one alteration or addition of certain lessons to be used on every Sunday in the year, and *the form of the litany altered and corrected,* and *two sentences only added in the delivery of the sacrament* to the communicants, and none other or otherwise. And there was a proviso, that such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this church of England by authority of parliament in the second year of the reign of king Edward the sixth, until other *order shall be taken therein by the authority of the queen's majesty, with the advice of her commissioners* appointed and authorised [242] under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm.

Of the lords and commons] It was not said *lords spiritual,* in this or either of the former acts; because all the bishops present dissented. *Gibs.* 268.

The form of the litany altered and corrected] By the omission of the clause, *from the tyranny of the bishop of Rome and all his detestable enormities;* which had been in the 2d and in the 5th of *Ed.* 6. *Gibs.* 268.

Two sentences only added in the delivery of the sacrament] Of the two forms now used at the delivery of the bread and wine, the first part of each (to the word *life* inclusive) was in the book of the second year of king Edward the sixth, but not the second part; but in the book of the fifth year was the second part, without the first: and the alteration made by virtue of this act, was the inserting of both as they now stand. *Gibs.* 268.

Order shall be taken by authority of the queen's majesty, with the advice of her commissioners] Two years afterwards, by virtue of this clause, the queen issued her commission to the archbishop and three others, to peruse the order of the lessons throughout the whole year, and to cause some new calendars to be imprinted; which were finished and sent to the several bishops to see them observed in their dioceses in the month of February 1560. *Gibs.* 268.

By Can. 36. *of the canons in* 1603; No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or be a lecturer or reader of divinity in any place; except he shall first subscribe (amongst others) to this article following; That the book of common prayer, and of ordering of bishops, priests and deacons, containeth nothing in it contrary to the word of God, and that it may be lawfully used, and that he himself will use the form in the said book prescribed, in publick prayer and administration of the sacraments, "and none other."

And by Can. 56. *of the same canons;* Every minister, being possessed of a benefice that hath cure and charge of souls, although he chiefly attend to preaching, and hath a curate under him to execute the other duties which are to be performed for him in the church, and likewise every other stipendiary preacher that readeth any lecture, or catechizeth, or preacheth in any church or chapel, shall twice at the least in every year read himself the divine service upon two several Sundays publicly and at the usual times, both in the forenoon and afternoon in the church which he so possesseth, or where he readeth, catechizeth or preacheth as is aforesaid, and shall likewise as often in every [243]
year administer the sacraments of baptism (if there be any to be baptised), and of the Lord's supper, in such manner and form, and with the observation of all such rites and ceremonies as are prescribed by the book of common prayer in that behalf: which if he do not accordingly perform, then shall he that is possessed of a benefice (as before) be suspended; and he that is but a reader, preacher, or catechizer, be removed from his place by the bishop of the diocese; until he or they shall submit themselves to perform all the said duties, in such manner and sort as before is prescribed.

After the passing of these canons, king James in the first year of his reign, by virtue of the aforesaid proviso in the 1 *El. c.* 2. upon the conference held before the king himself at Hampton Court, gave directions to the archbishop and other high commissioners, to review the common prayer book; and they did make several material alterations and enlargements of it, as in the office of private baptism, and in several rubricks and other passages, and added five or six new prayers and thanksgivings, and all that part of the catechism which contains the doctrine of the sacraments. And yet the powers specified in that proviso seem not to extend to the queen's heirs and successors, but to be only lodged personally in the queen; yet the book of common prayer so altered, stood in force from the first year of king James to the fourteenth of Charles the second. *Wats. c.* 31.

And it is to be observed, that the liturgy of the 13 & 14 *C.* 2.

is not the same with that which the aforesaid canons do refer to; so that so far forth the said canons as to this matter are not now in force.

Act of uniformity of the 13 & 14 C.2.

6. In the preface to the book of common prayer, concerning the service of the church; (which was also nearly the same in the 2d and in the 5th of *Ed.* 6.)—There was never any thing by the wit of man so well devised, or so sure established, which in continuance of time hath not been corrupted; as among other things, it may plainly appear by the common prayers in the church, commonly called divine service. The first original and ground whereof, if a man would search out by the ancient fathers, he shall find that the same was not ordained but of a good purpose, and for a great advancement of godliness. For they so ordered the matter, that all the whole Bible (or the greatest part thereof) should be read over once every year; intending thereby, that the clergy, and especially such as were ministers in the congregation, should by often reading and meditation in God's word be stirred up to godliness themselves, and be more able to exhort others by wholesome doctrine, and to
[244] confute them that were adversaries to the truth; and further, that the people, by daily hearing of holy scripture read in the church, might continually profit more and more in the knowledge of God, and be the more inflamed with the love of his true religion.

But these many years passed, this godly and decent order of the ancient fathers hath been so altered, broken, and neglected, by planting in uncertain *stories and legends*, with multitude of *responds*, verses, vain repetitions, *commemorations*, and *synodals*; that commonly when any book of the Bible was begun, after three or four chapters were read out, all the rest were unread. And in this sort the book of Isaiah was begun in advent, and the book of Genesis in septuagesima; but they were only begun, and never read through: after like sort were other books of holy scripture used. And moreover, whereas St. Paul would have such language spoken to the people in the church, as they might understand and have profit by hearing the same; the service in this church of England these many years hath been read in Latin to the people, which they understand not; so that they have heard with their ears only, and their heart, spirit, and mind have not been edified thereby. And furthermore, notwithstanding that the ancient fathers have divided the psalms into seven portions, whereof every one was called a *nocturn*; now of late time, a few of them have been daily said, and the rest utterly omitted. Moreover, the number and hardness of the rules called the *pie*, and the manifold changings of the service, was the cause that to turn to the book only was so hard and intricate a matter, that

many times there was more business to find out what should be read, than to read it when it was found out.

These inconveniences therefore considered, here is set forth such an order, whereby the same may be redressed. And for a readiness in this matter, here is drawn out a kalendar for that purpose, which is plain and easy to be understood; whereof (so much as may be) the reading of holy scripture is so set forth, that all things shall be done in order, without breaking one piece from another. For this cause be cut off anthems, responds, *invitatories*, and such like things, as did break the continual course of the reading of the scripture.

Yet because there is no remedy, but that of necessity there must be some rules, therefore certain rules are here set forth: which as they are few in number, so they are plain and easy to be understood. So that here you have an order for prayer, and for the reading of the holy scripture, much agreeable to the mind and purpose of the old fathers, and a great deal more profitable and commodious, than that which of late was used. It is more profitable, because here are left out many things, whereof some are untrue, some uncertain, some vain and superstitious, and nothing is ordained to be read but the very pure word of God, [245]
the holy scriptures, or that which is agreeable to the same; and that in such a language and order as is most easy and plain for the understanding both of the readers and hearers. It is also more commodious, both for the shortness thereof and for the plainness of the order, and for that the rules be few and easy.

And forasmuch as nothing can be so plainly set forth, but doubts may arise in the use and practice of the same; to appease all such diversity (if any arise), and for the resolution of all doubts concerning the manner how to understand, do, and execute the things contained in this book, the parties that so doubt, or diversely take any thing, shall alway resort to the bishop of the diocese, who by his discretion shall take order for the quieting and appeasing of the same; so that the same order be not contrary to any thing contained in this book. And if the bishop of the diocese be in doubt, he may send for the resolution thereof to the archbishop.

And although it be appointed, that all things shall be read and sung in the church *in the English tongue*, to the end that the congregation may be thereby edified; yet it is not meant, but that when men say morning and evening prayer privately, they may say the same in any language that they themselves do understand.

Stories and legends] That is, concerning the lives of the saints; of whom there being such a number in the church of Rome, few days are free from the stories and legends they relate of them. *Gibs.* 263.

Respond] A short anthem sung, after reading three or four verses of a chapter; after which the chapter proceeds. *Gibs.* 263.

Commemorations] The service of a lesser holiday falling in with a greater. *Id.*

Synodals] Constitutions made in provincial or diocesan synods, and published in the parish churches. *Id.*

Nocturn] So called from the ancient christians rising in the night to perform them. *Id.*

Pie] A table to find out the service belonging to each day; which becomes very difficult, by the coincidence of many offices on the same day. *Id.*

Invitatories] Some text of scripture, adapted and chosen for the occasion of the day, and used before the *venite;* which also itself is called the invitatory psalm. *Id.*

In the English tongue] By *Art.* 24. It is a thing plainly repugnant to the word of God, and the custom of the primitive church, to have publick prayer in the church, or to minister the sacraments, in a tongue not understanded of the people.

[246] And by the 2 & 3 *Ed.* 6. *c.* 1. it is provided, that it shall be lawful to any man that understandeth the Greek, Latin, and Hebrew tongue, or other strange tongue, to say and have the prayers of mattens and evensong in Latin or any such other tongue, saying the same privately, as they do understand. § 5.

And for the encouragement of learning in the tongues, in the universities of Cambridge and Oxford, it shall be lawful to use and exercise in their common and open prayer in their chapels (being no parish churches) or other places of prayer, the mattens, evensong, litany, and all other prayers (the holy communion, commonly called the mass, excepted) prescribed in the said book, in Greek, Latin, or Hebrew. § 6.

And by the 13 & 14 *C.* 2. *c.* 4. it is provided, that it shall be lawful to use the morning and evening prayer, and all other prayers and service prescribed in and by the said book, in the chapels or other public places of the respective colleges and halls in both the universities, in the colleges of Westminster, Winchester, and Eton, and in the convocations of the clergies of either province, in Latin. § 18.

And by the same statute, the bishops of Hereford, St. David's, Asaph, Bangor, and Llandaff, and their successors, shall take order that the said book be translated into the British or Welsh tongue, to be used in Wales where the Welsh tongue is commonly used; and at the same time an English book shall be had there likewise, that such as understand the same may have recourse thereunto, and such as do not understand the same may by conferring both tongues together the sooner attain to the knowledge of the English tongue. § 27.

And by the 5 *El. c.* 28. The bishops are in like manner re-

quired to cause the Old and New Testament to be translated into Welsh, and to have one English and one Welsh copy in every such respective place.

By the 13 & 14. *C.* 2. *c.*4. (which is *the last act of uniformity*) it is enacted as follows: Whereas by the neglect of ministers in using the order of common prayer during the time of the late troubles, great mischiefs and inconveniences have arisen; for the prevention thereof in time to come, and for settling the peace of the church, the king (according to his declaration of the five and twentieth of October 1660) *granted his commission under the great seal*, to several bishops and other divines, to review the book of common prayer, and to prepare such alterations and additions as they thought fit to offer: And afterwards the convocations of both the provinces being by his majesty called and assembled, his majesty hath been pleased to authorize and require the presidents of the said convocation, and other the bishops and clergy of the same, to review the said book of common prayer, and the book of the form and manner of the making and consecrating of bishops, priests, and deacons; and that after mature consideration, they should make such additions and alterations in the said books respectively, as to them should seem meet and convenient, and should exhibit and present the same to his majesty in writing, for his further allowance or confirmation: since which time, they the said presidents, bishops, and clergy of both provinces have accordingly reviewed the said books, and have made some alterations to the same which they think fit to be inserted, and some additional prayers to the said book of common prayer to be used upon proper and emergent occasions; and have exhibited and presented the same unto his majesty in writing in one book, intitled *The book of common prayer and administration of the sacraments and other rites and ceremonies of the church, according to the use of the church of England; together with the psalter or psalms of David, appointed as they are to be sung or said in churches; and the form and manner of making, ordaining, and consecrating of bishops, priests, and deacons.* All which his majesty having duly considered, hath fully approved and allowed the same, and recommended to this present parliament, that the said books of common prayer, and of the form of ordination and consecration of bishops, priests, and deacons, with the alterations and additions which have been so made and presented to his majesty by the said convocations, be the book which shall be appointed to be used by all that officiate in all cathedral and collegiate churches and chapels, and in all chapels of colleges and halls in both the universities, and the colleges of Eton and Winchester, and in all parish churches and chapels throughout the kingdom, and by all that make or consecrate bishops, priests, [247]

or deacons in any of the said places, under such sanctions and penalties as the houses of parliament shall think fit. § 1.

Now in regard that nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than an universal agreement in the public worship of God; and to the intent that every person within this realm may certainly know the rule to which he is to conform, in public worship and administration of sacraments and other rites and ceremonies of the church of England, and the manner how, and by whom bishops, priests, and deacons are and ought to be made, ordained, and consecrated; be it enacted by the king's
[248] most excellent majesty, by the advice and consent of the lords spiritual and temporal, and of the commons, in this present parliament assembled, That all and singular ministers in any cathedral, collegiate, or parish church or chapel, *or other place of public worship*, shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments, and all other the public and common prayer, *in such order and form as is mentioned in the said book*, intitled as aforesaid, and annexed and joined to this present act; and that the morning and evening prayers therein contained, shall upon every Lord's day and upon all other days and occasions, and at the times therein appointed, be openly and solemnly read by all and every minister or curate, in every church, chapel, or other place of public worship as aforesaid. § 2.

Granted his commission under the great seal] Which bore date March 25. 1661, and was directed to twelve bishops and twelve presbyterian divines: with nine assistants on each side, to supply the places of the principals, when they should be occasionally absent. In virtue of which commission, the commissioners met frequently at the Savoy, and disputations were held, but nothing concluded. *Gibs.* 275.

Or other place of public worship] By the 22 *G.* 2. *c.* 33. All commanders, captains, and officers at sea, shall cause the public worship of Almighty God, according to the liturgy of the church of England, to be performed in their respective ships; and prayers and preachings by the chaplains shall be performed diligently. *Art.* 1.

And by the *rubrick* before the service at sea: The morning and evening service to be used daily at sea, shall be the same which is appointed in the book of common prayer.

In such order and form as is mentioned in the said book] Provided, that in all those prayers, litanies, and collects, which do any way relate to the king, queen, or royal progeny, the names be altered and changed from time to time, and fitted to the present occasion, according to the direction of lawful authority.

13 & 14 *C.* 2. *c.* 4. § 25. That is, (according to practice), of the king or queen in council. *Gibs.* 280.

Books of common prayer to be provided.

7. By the 1 *El. c.* 2. The book of common prayer shall be provided at the charges of the parishioners of every parish and cathedral church before a certain day. § 19.

This was intended of the book of common prayer, as then established by that act.

By *Can.* 80. The churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the book of [249] common prayer, lately explained in some few points by his majesty's authority, according to the laws and his highness's prerogative in that behalf; and that with all convenient speed, but at the furthest within two months after the publishing of these our constitutions.

And this was intended of the same book of common prayer, as altered in the conference at Hampton-court as aforesaid.

Finally, by the 13 & 14 *C.* 2. *c.* 4. A true printed copy of the (*present*) book of common prayer, shall at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college, and hall, be provided before the feast of St. Bartholomew 1662; on pain of 3*l.* a month, for so long time as they shall then after be unprovided thereof. § 26.

And the respective deans and chapters of every cathedral or collegiate church were required at their proper costs and charges, before Dec. 25. 1662, to obtain under the great seal of England, a true and perfect printed copy of this act, and of the said book annexed hereunto, to be by the said deans and chapters and their successors kept and preserved in safety for ever, and to be also produced and shewed forth in any court of record as often as they shall be thereunto lawfully required; and also there shall be delivered true and perfect copies of this act and of the same book into the respective courts at Westminster, and into the tower of London, to be kept and preserved for ever among the records of the said courts, and the records of the tower to be also produced and shewed forth in any court as need shall require, which said books so to be exemplified under the great seal of England, shall be examined by such persons as the king shall appoint under the great seal of England for that purpose, and shall be compared with the original book hereunto annexed, and they shall have power to correct and amend in writing any error committed by the printer in printing of the same book, and shall certify in writing under their hands and seals, or the hands and seals of any three of them at the end of the same book, that they have examined and compared the same book, and find it to be a true and perfect copy; which said books, so exemplified under the great seal, shall be deemed to be good and available in the

law to all intents and purposes, and shall be accounted as good records as this book itself hereunto annexed. § 28.

Declaration of assent thereunto.

8. By the 13 & 14 *C.* 2. *c.* 4. Every person who shall be presented, or collated, or put into any ecclesiastical benefice or promotion, shall in the church, chapel, or place of public worship [250] belonging to the same, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's day, openly, publicly, and solemnly read the morning and evening prayers, appointed to be read by and according to the said book of common prayer at the times thereby appointed, or to be appointed; and after such reading thereof, shall openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words and no other: "I A. B. do here declare my unfeigned assent and "consent to all and every thing contained and prescribed in and "by the book, intituled The book of common prayer and ad-"ministration of the sacraments and other rites and ceremonies "of the church, according to the use of the church of England, "together with the psalter or psalms of David, pointed as they "are to be sung or said in churches; and the form or manner of "making, ordaining, and consecrating of bishops, priests, and "deacons." And every such person, who shall (without some lawful impediment to be allowed and approved by the ordinary of the place) neglect or refuse to do the same within the time aforesaid, (or in case of such impediment, within one month after such impediment removed,) shall *ipso facto* be deprived of all his said ecclesiastical benefices and promotions; and the patron shall present or collate as if he were dead. § 6.

And every person who shall be appointed or received as a lecturer, to preach upon any day of the week, in any church, chapel, or place of public worship, the first time he preacheth (before his sermon) shall openly, publicly, and solemnly read the common prayers and service appointed to be read for that time of the day, and then and there publicly and openly declare his assent unto and approbation of the said book, and to the use of all the prayers, rites, and ceremonies, forms and orders therein contained, according to the form before appointed in this act; and shall upon the first lecture day of every month afterwards, so long as he continues lecturer or preacher there, at the place appointed for his said lecture or sermon, before his said lecture or sermon, openly, publicly, and solemnly read the common prayers and service for that time of the day, and after such reading thereof shall openly and publicly before the congregation there assembled declare his unfeigned assent unto the said book, ac-[251] cording to the form aforesaid: and every such person who shall neglect or refuse to do the same, shall from thenceforth be dis-

abled to preach the said or any other lecture or sermon in the said or any other church, chapel, or place of public worship, until he shall openly, publicly, and solemnly read the common prayers and service appointed by the said book, and conform in all points to the things therein prescribed, according to the purport and true intent of this act. Provided, that if the said lecture be to be read in any cathedral or collegiate church or chapel, it shall be sufficient for the said lecturer, openly at the time aforesaid, to declare his assent and consent to all things contained in the said book, according to the form aforesaid. And if any person who is by this act disabled (or prohibited, 15 *C.* 2. *c.* 6. § 7.) to preach any lecture or sermon, shall during the time that he shall continue so disabled (or prohibited) preach any sermon or lecture, he shall suffer three months' imprisonment in the common gaol; and any two justices of the peace of any county within this realm, and the mayor or other chief magistrate of any city or town corporate within the same, upon certificate from the ordinary made to him or them of the offence committed, shall and are hereby required to commit the person so offending to the gaol of the same county, city, or town corporate. Provided that at all times when any sermon or lecture is to be preached, the common prayers and service in and by the said book appointed to be read for that time of the day shall be openly, publicly, and solemnly read by some priest or deacon, in the church, chapel, or place of public worship where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. And provided, that this act shall not extend to the university churches, when any sermon or lecture is preached there as and for the university sermon or lecture; but the same may be preached or read in such sort and manner as the same have been heretofore preached or read. §§ 19, 20, 21, 22, 23.

Subscription and declaration of conformity.

9. Every dean, canon, and prebendary of every cathedral or collegiate church, and all masters and other heads, fellows, chaplains, and tutors of or in any college, hall, house of learning, or hospital, and every public professor and reader in either of the universities, and in every college elsewhere, and every parson, vicar, curate, lecturer, and every other person in holy orders, and every schoolmaster keeping any public or private school, and every person instructing or teaching any youth in any house or [252] private family as a tutor or schoolmaster, who shall be incumbent, or have possession of any deanery, canonry, prebend, mastership, headship, fellowship, professor's place or reader's place, parsonage, vicarage, or any other ecclesiastical dignity or promotion, or of any curate's place, lecture, or school, or shall instruct or teach any youth as tutor or schoolmaster, shall, at or

before his admission to be incumbent or having possession aforesaid, subscribe the declaration following: "I A. B. do declare, "that I will conform to the liturgy of the church of England, as "it is now by law established." 13 & 14 *C.*2. *c.*4. § 8. 1 *W. sess.* 1. *c.*8. § 11.

Which said declaration shall be subscribed by every of the said masters and other heads, fellows, chaplains, and tutors of or in any college, hall, or house of learning, and by every public professor and reader in either of the universities, before the vice chancellor or his deputy; and by every other of the said persons before the archbishop, bishop, or ordinary of the diocese (or his vicar-general, chancellor, or commissary, 15 *C.*2. *c.*6. § 5.): on pain of forfeiting such office, place, promotion or dignity, and being utterly disabled and *ipso facto* deprived of the same; which shall be void, as if such person failing were naturally dead, 13 & 14 *C.*2. *c.*4. § 10.

And if any schoolmaster or other person instructing or teaching youth in any private house or family as a tutor or schoolmaster shall instruct or teach any youth as a tutor or schoolmaster before such subscription, he shall for the first offence suffer three months' imprisonment, and for the second and every other offence shall suffer three months' imprisonment, and also forfeit *5l.* to the king. § 11.

And after such subscription made, every such parson, vicar, or curate and lecturer, shall procure a certificate under the hand and seal of the respective archbishop, bishop, or ordinary of the diocese (who shall make and deliver the same upon demand); and shall publicly and openly read the same, together with the said declaration, upon some Lord's day within three months then next following, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service: upon pain that every person failing therein (without some lawful impediment to be allowed and approved by the ordinary of the place, 23 *G.*2. *c.*28.) shall lose such place respectively, and be disabled and *ipso facto* deprived thereof, and the same shall be void as if he were naturally dead. § 11.

[253] Provided, that the penalties in this act shall not extend to the foreigners or aliens of the foreign reformed churches, allowed by the king, his heirs and successors in England. § 15.

Provided, that no title to confer or present by lapse shall accrue by any avoidance or deprivation *ipso facto* by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron, or such sentence of deprivation openly and publicly read in the parish church of the benefice, parsonage, or vicarage becoming void, or whereof the incumbent shall be deprived by virtue of this act. § 16.

And no form or order of common prayers, administration of

sacraments, rites, or ceremonies, shall be openly used in any church, chapel, or other public place, of or in any college or hall in either of the universities, or of the colleges of Westminster, Winchester, or Eton, other than what is prescribed by the said book; and every governor or head of any of the said colleges or halls, shall within one month next after his election or collation and admission into the same government or headship, openly and publicly in the church, chapel, or other public place of the same college or hall, and in the presence of the fellows and scholars of the same or the greater part of them then resident, subscribe unto the said book, and declare his unfeigned assent and consent thereunto, and to the use of all the prayers, rites and ceremonies, forms and orders therein prescribed and contained, according to the form aforesaid: and all such governors or heads of the said colleges and halls as shall be in holy orders, shall once at least in every quarter of the year (not having a lawful impediment) openly and publicly read the morning prayer and service in and by the said book appointed to be read in the church, chapel, or other public place of the same college or hall; on pain to lose and be suspended from all the benefits and profits belonging to the same government or headship, by the space of six months, by the visitor or visitors of the same college or hall; and if such governor or head so suspended for not subscribing to the said book, or for not reading of the morning prayer and service as aforesaid, shall not at or before the end of six months next after such suspension subscribe unto the said book and declare his consent thereto as aforesaid, or read the morning prayer and service as aforesaid, then such government or headship shall be *ipso facto* void. § 17.

Provided, that in the same colleges and halls as aforesaid, the [254]
said service as aforesaid may be used in Latin. § 18.

Provided also, that nothing in this act shall be prejudicial to the king's professor of the law within the university of Oxford, for or concerning the prebend of Shipton within the cathedral church of Sarum, united and annexed unto the place of the same king's professor for the time being by the late king James of blessed memory. § 29.

Penalty of contemning or not using the same.

10. By *Can.* 4. Whosoever shall affirm, that the form of God's worship in the church of England, established by law, and contained in the book of common prayer and administration of sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth any thing in it that is repugnant to the scriptures, let him be excommunicated *ipso facto*, and not restored but by the bishop of the place, or archbishop, after his repentance and public revocation of such his wicked errors.

By *Can.* 38. If any minister after he hath subscribed to the book of common prayer, shall omit to use the form of prayer, or

any of the orders or ceremonies prescribed in the communion book, let him be suspended; and if after a month he do not reform and submit himself, let him be excommunicated; and then if he shall not submit himself within the space of another month, let him be deposed from the ministry.

And by *Can.* 98. After any judge ecclesiastical hath pronounced judicially against contemners of ceremonies, for not observing the rites and orders of the church of England, or for contempt of public prayer; no judge *ad quem* shall allow of his appeal, unless the party appellant do first personally promise and avow, that he will faithfully keep and observe all the rites and ceremonies of the church of England, as also the prescript form of common prayer, and do likewise subscribe to the same.

By the 13 & 14 *C.* 2. *c.* 4. In all places where the proper incumbent of any parsonage, or vicarage, or benefice with cure, doth reside on his living, and keep a curate; the incumbent himself in person (not having some lawful impediment to be allowed by the ordinary of the place) shall once at the least in every month openly and publicly read the common prayers and service in and by the said book prescribed, and (if there be occasion) administer each of the sacraments and other rites of the church, in the parish church or chapel belonging to the same, in such order, manner, and form, as in and by the said
[255] book is appointed: on pain of 5*l.* to the use of the poor of the parish for every offence, upon conviction by confession, or oath of two witnesses, before two justices of the peace; and in default of payment within ten days, to be levied by distress and sale by warrant of the said justices, by the churchwardens or overseers of the poor of the said parish. § 7.

By the 2 *&* 3 *Ed.* 6. *c.* 1. and 1 *El. c.* 2. it is enacted as followeth: *If any parson, vicar, or other whatsoever minister*, that ought or should sing or say common prayer mentioned in the said book, or minister the sacraments, *refuse to use the said common prayers*, or to minister the sacraments in such cathedral or parish church, or other places as he should use to minister the same, *in such order and form* (9), as they be mentioned and set forth in

(9) A clergyman in performance of divine worship cannot alter or omit any part of it, though if he do so from mere feelings of delicacy it would greatly extenuate the omission: nor can he give vent to his malevolence, by public addresses to obnoxious parishioners in a manner which amounts to reprehension leading to quarrelling, and an attempt to make the church a place of public dispute and confusion. *Newbery* v. *Goodwin*, 1 *Phill. Rep.* 282. A parish clerk may make proclamation during divine service, when directed by the minister, doing the same decently. Thus, proclamation for the meeting of a vestry, or for the purport of such meeting, is both convenient and proper, as the parishioners are supposed to be assembled together

the said book; or shall wilfully or obstinately, standing in the same, *use any other rite*, ceremony, order, form, or manner of celebrating the Lord's supper, openly or privily, or mattens, evensong, administration of the sacraments, *or other open prayer*, than is mentioned and set forth in the said book; or shall preach, declare, or speak any thing in the derogation or depraving of the said book, or any thing therein contained, or of any part thereof; and shall be thereof lawfully convicted, according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact; he *shall forfeit* to the king (*if the prosecution is on the statute of the 2 & 3 Ed.6.*) for his first offence the profit of such one of his spiritual benefices or promotions as it shall please the king to appoint, coming or arising in one whole year after his conviction, and also be imprisoned for six months; and for his second offence be imprisoned for a year, and be deprived *ipso facto* of all his spiritual promotions, and the patron shall present to the same as if he were dead; and for the third offence shall be imprisoned during life; and if he shall not have any spiritual promotion, he shall for the first offence suffer imprisonment six months, and for the second offence imprisonment during life. *And if the prosecution is on the statute of the 1 El. c.2. then* he shall forfeit to the king for the first offence the profit of all his spiritual promotions for one year, and be imprisoned for six months: for the second offence shall be imprisoned for a year, and be deprived *ipso facto* of all his spiritual promotions, and the patron shall present as if he were dead: and for the third offence shall be deprived *ipso facto* of all his spiritual promotions, and be imprisoned during life; and if he have no spiritual promotion, he shall for the first offence be imprisoned for a year, and for the second offence during life.

And by the said statutes, If any person shall in any interludes, [256]
plays, songs, rhymes, or by other open words, declare or speak any thing in the derogation, depraving, or despising of the same book, or of any thing therein contained, or any part thereof; or shall by open fact, deed, or by open threatenings, compel or cause, or otherwise procure or maintain any parson, vicar, or other minister in any cathedral or parish church, or chapel, or any in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise, or in any other manner and form than is mentioned in the said book; or by any of the said means shall unlawfully interrupt or let any parson, vicar, or other minister, in any cathedral or parish church, chapel or other place, to sing or say any common and open prayer,

for divine service; but the proclamation of the result is the contrary. *Thompson* v. *Tapp*, *MSS. Cas.* 17.

or to minister the sacraments or any of them, in such manner and form as is mentioned in the said book; every such person, being thereof lawfully convicted in form aforesaid, shall (*if the prosecution is on the statute of the 2 & 3 Ed. 6.*) forfeit to the king for the first offence 10*l.*, for the second offence 20*l.*, for the third offence shall forfeit all his goods and be imprisoned during life: and if for the first offence he do not pay the 10*l.* within six weeks after his conviction, he shall instead of the said 10*l.* be imprisoned for three months; and if for the second offence he do not pay the said sum of 20*l.* within six weeks after his conviction, he shall instead of the said 20*l.* be imprisoned for six months. *And if the prosecution is on the statute of the 1 El. c. 2. then he shall* forfeit to the king for the first offence 100 marks, for the second offence 400 marks, for the third offence shall forfeit all his goods and be imprisoned during life: and if he do not pay the sum for the first offence within six weeks next after his conviction, he shall instead thereof be imprisoned for six months; and if he do not pay the sum for the second offence within six weeks next after his conviction, he shall instead thereof be imprisoned for twelve months.

And the justices of assize shall have power to inquire of, hear, and determine all offences contrary to the said acts, and to make process for the execution of the same, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof. Provided, that *every archbishop and bishop* may at his liberty and pleasure associate himself to the said justices of assize, for the inquiring of, hearing, and determining the same.

But no person shall be molested for any offence against these acts, unless he be indicted thereof at the next assizes.

And lords of parliament for the said offences on the 2 & 3 *Ed. 6.* to be tried by their peers. *But if the prosecution is on the 1 El. c. 2. then they shall only* for the third offence be tried by their peers.

[257] And all mayors, bailiffs, and other head officers of cities, boroughs, or towns corporate, to which justices of assize do not commonly repair, shall have power to inquire of, hear, and determine offences against these acts within fifteen days after the feast of Easter and St. Michael the archangel yearly, as the justices of assize may do.

Provided that all archbishops and bishops, and every of their chancellors, commissaries, archdeacons, and other ordinaries having any peculiar ecclesiastical jurisdiction, shall have power by virtue of these acts, as well to inquire in their visitations, synods, and elsewhere within their jurisdiction, at any other time and place, to take accusations and informations of all and every the things above mentioned done or committed within the limits of their jurisdiction, and to punish the same by admonition, ex-

communication, sequestration, or deprivation, and other censures and process, in like form as heretofore hath been used in like cases by the king's ecclesiastical laws. And for their authority in this behalf, all and singular the same archbishops, bishops, and other their officers exercising ecclesiastical jurisdiction as well in places exempt as not exempt within their diocese, shall have full power and authority to reform, correct, and punish by censures of the church, all and singular the said offenders within any their jurisdictions or diocese; any other law, statute, privilege, liberty, or provision heretofore made, had, or suffered to the contrary notwithstanding. Provided, that whatsoever persons, shall for their offences first receive punishment of their ordinary having a testimonial thereof under the ordinary's seal, shall not for the same offence eftsoons be convicted before the justices; and likewise receiving for the said offence punishment first by the justices, shall not for the same offence eftsoons receive punishment of the ordinary.

If any parson, vicar, or other whatsoever minister] Popish priests, as well as others; for in an action hereupon in the 3 *El.* brought against a popish priest for saying mass, it was held by the whole court, that he was within the purview of the statute of the 1 *El.*, it appearing clearly by the next clause thereof, that the design of the parliament was, to abolish the superstitious service, and to establish the new service in its place. *Dyer*, 203.

Use any other rite] In the 26 & 27 *El.* Fleming was indicted upon this statute of the 1 *El.* and punished; because he had given the sacrament of baptism in other form than is here prescribed. 1 *Leon.* 295.

E. 1 *Ja.* 2. An indictment for using *other prayers*, and *in other manner*, seems to have been judged insufficient, because the prayers used may be upon some extraordinary occasion, and so [258]
no crime; and it was said, that the indictment ought to have alleged, that the defendant used other forms and prayers *instead* of those injoined, which were neglected by him; for otherwise every person may be indicted that useth prayers before his sermon, other than such which are required by the book of common prayer. 3 *Mod.* 79.

Or other open prayer] By the said acts, *open prayer* in and throughout the same, meaneth that prayer which is for others to come unto, or hear either in common churches, or private chapels or oratories, commonly called the service of the church.

Shall forfeit] A clerk was indicted hereupon, for using other prayers, and was fined 100 marks; and it was held by the whole court to be ill: because they can inflict no other punishment than what is directed by the statute. 3 *Mod.* 79.

All archbishops and bishops] If a minister preach against the book of common prayer, this is a good cause of deprivation by

the ecclesiastical law without aid of the said statutes: for he that speaketh against the peace and quiet of the church, is not worthy to be a governor of the church. And the statutes being in the affirmative, do not take away the ordinary's power of depriving for the first offence: on the contrary, there is an express proviso, which reserveth to him his power. 2 *Roll's Abr.* 222.

H. 33 *El.* Robert Caudrey, clerk, was deprived of his benefice before the high commissioners, as well for that he had preached against the book of common prayer, as also for that he refused to celebrate divine service according to the said book; which deprivation, though not prescribed by the statutes for the first offence, was declared to be good; because the ecclesiastical judge might lawfully inflict such sentence before the making of these statutes, and is not inhibited (on the contrary his ancient power is reserved) by the same statutes. *Gibs.* 268. 5 *Co.* *Caudrey's* case. (*q*)

[259] **Penalty of being present at any other.**

11. By the 5 & 6 *Ed.* 6. *c.* 1. If any person shall willingly and wittingly hear and be present at any other manner or form of common prayer or administration of the sacraments, or of making ministers in the church, or of any other rites contained in the book of common prayer, than is mentioned and set forth in the said book [*except persons qualified by the acts of toleration, as before is mentioned, or the* 31 *G.* 3. *c.* 32.], and shall be thereof convicted according to the laws of this realm, before the justices of assize or justices of the peace in their sessions, by the verdict of twelve men, or by confession, or otherwise; he shall for the first offence suffer imprisonment for six months, for the second imprisonment for a year, and for the third offence imprisonment during life. § 6.

III. *Orderly behaviour during the divine service.*

By the canons.

1. *Can.* 18. No man shall *cover his head* in the church or chapel in the time of divine service, except he have some infirmity; in

(*q*) At Thetford Lent assizes 1795, a clerk was indicted upon these statutes; but the evidence was not, that he had left out or added any prayers or altered the form of worship, but that he did not read prayers twice on a Sunday, but alternately one Sunday in the morning and the next in the evening, and omitted to read them at all on certain saints' days. The learned judge who tried the indictment, Mr. Baron *Perryn*, observed that it was *primæ impressionis*; and being of opinion that the offence complained of was purely of ecclesiastical cognizance, and not the subject of prosecution in the temporal courts, directed the jury to acquit the defendant; which they accordingly did. Vid. *infra*, IV. 1 & 2. [As to deprivation for preaching against the 39 articles, see *Stone*'s case, 1 *Hagg. Rep.* 424. *ante*, tit. Articles, *notis*.]

which case let him wear a night-cap, or coif. All manner of persons then present shall reverently kneel upon their knees, when the general confession, litany, or other prayers are read; and shall stand up at the saying of the belief, according to the rules in that behalf prescribed in the book of common prayer. And likewise when in time of divine service the Lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it hath been accustomed; testifying by these outward ceremonies and gestures their inward humility, christian resolution, and due acknowledgment that the Lord Jesus Christ, the true eternal Son of God, is the only Saviour of the world, in whom alone all the mercies, graces, and promises of God to mankind, for this life and the life to come, are fully and wholly comprised. And none, either man, woman, or child, of what calling soever, shall be otherwise at such time busied in the church, than in quiet attendance to hear, mark, and understand that which is read, preached, or ministered; saying in their due places audibly with the minister, the confession, the Lord's prayer, and the creed; and making such other answers to the public prayers, as are appointed in the book of common prayer; neither shall they disturb the service or sermon, by walking or talking, or any other way; nor depart out of the church during the time of divine service or sermon, without some urgent or reasonable cause.

Cover his head] In the 18 *C.* 2. An action of trespass for [260]
assault and battery was brought against a churchwarden: who pleaded that the plaintiff had his hat on in time of divine service, and that he desired him to put it off, and upon refusal took it off, and delivered it into his hand. And all the court held, that the plea was good; except Twisden, who conceived that all that the churchwarden could do, was to present him to the spiritual court: though it is very apparent, how necessary an immediate remedy is, in case of this or the like disorders committed in the worship of God. The court also said, that the churchwardens may chastise boys playing in the churchyard, — and much more in the church. *Gibs.* 294. 2 *Keb.* 124. *Sid.* 301. (1)

Can. 19. The churchwardens or questmen and their assist-

(1) *Hawe* v. *Planner,* 1 *Saund. Rep.* 14.; S. C. 1 *Hawk.* 139.; and see *Glover* v. *Hind,* 1 *Mod.* 168.

Churchwardens may and ought to repress all indecent interruptions of the service by others, and desert their duty if they do not. And if a case could be imagined, in which even a preacher himself was guilty of any act, grossly offensive, either from natural infirmity or disorderly habits, it cannot be said that they, or even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes ordinary rules. Per Sir *W. Scott,* 1 *Hagg. R.* 174.

ants, shall not suffer any idle persons to abide either in the churchyard or church porch, during the time of divine service; but shall cause them either to come in, or to depart.

Can. 85. The churchwardens or questmen shall take care that in every meeting of the congregation peace be well kept; and that all persons excommunicated, and so denounced, be kept out of the church.

Can. 90. The churchwardens or questmen shall diligently see that none do walk or stand idle or talking in the church, or in the churchyard, or the church porch, during the time of divine service.

Can. 111. In all visitations of bishops and archdeacons, the churchwardens or questmen and sidesmen shall truly and personally present the names of all those which behave themselves rudely or disorderly in the church; or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher.

By the statute of the 1 Mar.

2. By the 1 *Mar. sess.* 2. *c.* 3. If any person of his own power and authority shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful ways or means disquiet or misuse any preacher that shall be licensed, allowed, or authorised to preach by the queen's highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorised or charged by reason of his cure, benefice, or other spiritual promotion or charge in any of his open sermon, preaching, or collation that he shall make, declare, preach, or pronounce, in any church, chapel, churchyard, or in any other place, used, frequented, or appointed to be preached in. § 2.

Or shall maliciously, willingly, or of purpose molest, let, disturb, vex, disquiet, or otherwise trouble, any parson, vicar,
[261] parish priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering, or celebrating the mass, or other such divine service, sacraments or sacramentals, as was most commonly frequented and used in the last year of the reign of king Henry the eighth, or that at any time hereafter shall be allowed, or authorised by the queen's majesty. § 3.

Or shall contemptuously, unlawfully, or maliciously, of their own power or authority, pull down, deface, spoil, abuse, break, or otherwise unreverently handle or order the most blessed, comfortable, and holy sacrament of the body and blood of our Saviour Jesus Christ, commonly called the sacrament of the altar, that shall be in any church or chapel, or in any other decent place, or the pix or canopy wherein the same sacrament shall be; or unlawfully, contemptuously, or maliciously, of his own power

and authority, pull down, deface, spoil, or otherwise break any altar, crucifix, or cross that shall be in any church, chapel, or churchyard: —— That then every such offender in any of the premises, his aiders, procurers, or abettors, immediately and forthwith after the offence committed, *shall be apprehended* by any constable or churchwarden of the parish, town, or place where the offence shall be committed, or by any other officer, or by any other person then being present at the time of the offence committed. § 4.

Which person so apprehended shall with convenient speed be carried to a justice of the peace; who shall, upon due accusation by the apprehender or other person of such offence, commit him in safe keeping and custody as by his discretion shall be thought meet; and within six days next after the said accusation made, the said justice, with one other justice, shall diligently examine the offence. § 5.

And if they shall find him guilty, by two witnesses or by confession, they shall immediately with convenient speed commit him to gaol for three months, and further to the next quarter sessions to be holden next after the end of the said three months. At which quarter sessions, the person so committed to gaol, upon his reconciliation and repentance in that behalf, before the said justices at the said sessions, shall be discharged out of prison, upon sufficient surety of his good abearing and behaviour, to be then and there taken by the said justices, for one whole year then next ensuing: And if he will not be reconciled and repent at the said quarter sessions, then he shall immediately in time convenient be further committed to the said gaol by the said justices or the more part of them, there to remain without bail until he shall be reconciled and be penitent for the said offence. § 6.

And if any person of his own authority and power, willingly and unlawfully do rescue any offender so apprehended, or will disturb, hinder, or let such offender to be apprehended; he shall suffer like imprisonment as aforesaid, and further shall forfeit [242] *5l.* § 7.

And if any such offender be not apprehended immediately in time convenient as aforesaid, but do escape or go away; then the said escape shall be lawfully presented before the justices of the peace at the next quarter sessions: and the inhabitants of the parish where the escape was so suffered shall forfeit to the queen for every such escape *5l.*; to be levied as other like amerciaments, upon any village, hundred, or town, for the escape of a murderer, or other felon, for not making hue and cry. § 8.

And all justices of the peace, justices of assize, mayors, bailiffs, and justices of the peace within any city or town corporate, shall have power to inquire of, hear, and determine the said offences, and to set the said fines. § 9.

Provided, that this shall not in any wise extend to abrogate and take away the authority, jurisdiction, power, and punishment of the ecclesiastical laws now standing and remaining in their force, or for the punishment of any of the offences and misdemeanors aforesaid: but the same shall stand in force as if this act had not been made. § 10.

Provided, that persons for any the said offences receiving punishment of the ordinary, having a testimonial thereof under his seal, shall not for the same eftsoons be convicted before the justices; and in likewise receiving for the said offences punishment by the justices, shall not for the same eftsoons receive punishment of the ordinary. § 11.

Or other such divine service] It hath been resolved, that the disturbance of a minister in saying the present common prayer, is within this statute; for the express mention of such divine service, as should afterwards be authorised by queen Mary, doth implicitly include such also as should be authorised by her successors: for since the king never dies, a prerogative given generally to one, goeth of course to others. 1 *Haw.* 140.

Shall be apprehended] In the case of *Glover* and *Hind*, *M.* 25 *C.* 2., where an action of trespass of assault and battery was brought, for laying hands on the disturber; it was declared by the court, that at the common law a person disturbing divine service might be removed *by any other person there present*, as being all concerned in the service of God that was then performing; so that the disturber was a nuisance to them all, and might be removed by the same rule of law that allows a man to abate a nuisance. *Gibs.* 304. 1 *Mod.* 168.

E. 15 *C.* 2. The court refused to grant a *certiorari* to remove
[263] an indictment at the sessions against the defendant for not behaving himself reverently and modestly at the church during divine service; because although the offence is punishable by ecclesiastical censures, yet they judged it a proper cause within cognizance of the justices of the peace, and indictable. 1 *Keb.* 491.

By the act of Toleration.

3. By the 1 *W.* *c.* 18. If any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher; he shall on proof thereof before a justice of the peace, by two witnesses, find two sureties to be bound by recognizance in the sum of 50*l.*, and in default of such sureties shall be committed to prison, there to remain till the next general quarter sessions; and upon conviction of the said offence at such sessions, shall suffer the penalty of 20*l.* § 18. (*r*)

(*r*) It has been decided that an indictment upon this act at the quarter sessions may before verdict be removed by *certiorari* into

[And a similar penalty is inflicted on those who shall in the same way disturb any congregation or assembly of religious worship, permitted to catholics by the 31 *G.* 3. *c.* 32. § 10.] By 31 G. 3. c. 32.

4. By the 1 *G. st.* 2. *c.* 5. If any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship certified and registered according to the 1 *W. c.* 18., the same shall be adjudged felony, without benefit of clergy. And the hundred shall answer damages, as in cases of robbery. § 4. 6. By the riot act.

IV. *Performance of the divine service, in the several parts thereof.* (2)

The occasional offices are treated of under the title Holidays.

1. *Can.* 14. The common prayer shall be said or sung distinctly and reverently, upon such days as are appointed to be kept holy by the book of common prayer, and their eves, and at convenient and usual times of those days, and in such places of every church, as the bishop of the diocese or ecclesiastical ordinary of the place shall think meet for the largeness or straitness [264] of the same, so as the people may be most edified. All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the book of common prayer, as well in reading the Holy Scriptures, and saying of prayers, as in administration of the sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof. Common prayer to be used on holidays.

[By 57 *G.* 3. *c.* 99. § 51. The bishop of a diocese may enforce the performance of the morning and evening service on Sundays, or any other service required by law, in any parish church or chapel, or extra-parochial church, by monition and sequestration, issued as in § 26. provided: before which enactment, articles have been admitted against a minister for not performing evening service. (3)]

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the court of King's Bench; and upon conviction of several defendants, each is liable to the penalty of 20*l.* *Rex* v. *Hube and others*, 5 *T. Rep.* 542. [See Dissenters.]

(2) No special rule will now be granted to defend in ejectment, only for a right to enter and perform divine service. *Martin* v. *Davis*, *Stra.* 914., denying *Hillingsworth* v. *Brewster*, *Salk.* 256. Reading prayers or a sermon in a family is not performing divine service. "Divine service" is an expression often used in acts of parliament, "which direct the reading of proclamations after divine service." *Trebec* v. *Keith*, 2 *Atk.* 499.

(3) *Talbot* v. *Filewood*, *MSS. Cas.* 36.

On other days.

2. And by the *preface to the book of common prayer:* All priests and deacons are to say daily the morning and evening prayer, either privately or openly, not being let by sickness, or some other urgent cause.

And the curate that ministreth in every parish church or chapel, being at home, and not being otherwise reasonably hindered, shall say the same in the parish church or chapel where he ministreth: and shall cause a bell to be tolled thereunto, a convenient time before he begin, that the people may come to hear God's word, and to pray with him. Vide *supra*, II. 10. *in the note*.

In what part of the church.

3. By the rubrick before the common prayer of the 2 *Ed.* 6. it was ordered thus: The priest being *in the quire shall begin* with a loud voice the Lord's prayer, called the Paternoster.

In the quire] That is, in his own seat there, as the way was all Edward the sixth's time, and as is still done in some churches: but in the beginning of queen Elizabeth's reign, reading-desks began to be set up in the body of the church, and divine service to be read there, by appointment of the ordinaries, according to the power vested in them by the rubrick of the 5 & 6 *Ed.* 6. *Gibs.* 297.

Shall begin] All that now goes before, *viz.* the sentences, exhortation, confession, and absolution, were first inserted in the second book of Edward the sixth. 2 *Burnet*, 76.

By the rubrick before the present common prayer: *The morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel, except it shall be otherwise determined by the ordinary of the place.*

Habit of the minister officiating.

4. By *Can.* 58. Every minister saying the public prayers, or ministering the sacraments or other rites of the church, shall wear a decent and comely surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary. Furthermore, such ministers as are graduates shall wear upon their surplices at such times, such hoods as by the orders of the universities are agree-
[265] able to their degrees; which no minister shall wear, being no graduate, under pain of suspension: notwithstanding, it shall be lawful for such ministers as are not graduates, to wear upon their surplices, instead of hoods, some decent tippet of black, so it be not silk.

But this canon (which is somewhat observable) is in part destroyed by the statute law, and by the rubrick, before the present common prayer.

For by the 1 *El. c.* 2. it is provided, That such ornaments of the church, and of the ministers thereof, shall be retained and used, as was in this church of England by authority of parliament

in the second year of the reign of king Edward the sixth; until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorised under the great seal for causes ecclesiastical, or of the metropolitan of this realm. § 25. Which other order as to this matter, was never taken.

And by the rubrick before the common prayer of the 13 & 14 C. 2. *It is to be noted, that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use, as were in this church of England, by the authority of parliament in the second year of the reign of king Edward the sixth.*

Therefore it is necessary to recur in this matter to the common prayer book established by act of parliament in the second year of king Edward the sixth. In which there is this rubrick: "In "the saying or singing of *matens* and *evensonge*, *bapitzyng* and "*burying*, the minister in paryshe churches and chapels annexed "to the same, shall use a *surples*. And in all cathedrall churches "and colledges the archdeacons, deanes, provestes, maisters, "prebendaryes, and fellowes, beinge graduates, may use in the "quiere, beside theyr surplesses, such hoodes as pertaineth to "their several degrees whiche they have taken in any universitie "within this realme. But in all other places, every minister "shall be at libertie to use any surplus or no. It is also seemly "that graduates, when they dooe preache, should use suche "hoodes as pertayneth to theyr several degrees."

So that in marrying, churching of women, and other offices not here specified, and even in the administration of the holy communion, it seemeth that a surplice is not necessary. And the reason why it is not injoined for the holy communion in particular, is, because other vestments are appointed for that ministration, which are as followeth: "Upon the day, and at "the time appointed for the ministracion of the holy communion, [266] "the priest that shall execute the holye ministry, shall put upon "hym the vesture apointed for that ministracion, that is to say, "a white *albe* plain, with a vestment or *cope*. And where there "be many priestes or deacons, there so many shall be ready to "helpe the priest in the ministracion, as shall be requisite; and "shall have upon them likewyse the vestures appointed for their "ministery, that is to say, *albes* with *tunacles*."

Note, The alb differs from the surplice in being close-sleeved.

"And whensoever the bushop shall celebrate the holye communion in the churche, or execute any other publique minis"tracion; he shall have upon him, besyde his rochette, a surples "or albe, and a cope or vestment, and also hys pastoral staffe in "hys hand, or elles borne or holden by hys chaplyne."

5. In the 2d of *Ed.* 6. The order for morning and every Morning

and evening prayer. prayer began (as was said before) with the Lord's prayer, and ended with the third collect for grace; the other five prayers that now follow having been added since. *Gibs.* 300.

From which, and from other observations which follow, it will appear, that besides the several offices being now generally put into one, which at first were distinct and separate, they are now become much longer than originally they were, by the additions from time to time which have thereunto been made.

Psalms. 6. *Rubr.* The psalter followeth the division of the Hebrews, and the translation of the great English Bible, set forth and used in the time of king Henry the eighth and Edward the sixth.

Litany. 7. *Can.* 15. The litany shall be said or sung, when and as is set down in the book of common prayer, by the parsons, vicars, ministers, or curates, in all cathedral, collegiate, and parish churches, and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place; more particularly, upon the Wednesdays and Fridays weekly, though they be not holidays, the minister at the accustomed hours of service shall resort to the church and chapel, and warning being given to the people by tolling of a bell, shall say the litany prescribed in the book of common prayer: whereunto we wish every householder, dwelling within half a
[267] mile of the church, to come or send one at the least of his household fit to join with the minister at prayers.

Prayers and thanksgivings after the litany. 8. Of the prayers and thanksgivings which now stand at the end of the litany service, the first two prayers (for rain and fair weather) were at the end of the communion service in the book of the 2 *Ed.* 6. To which were added in the 5 *Ed.* 6. these prayers. In the time of dearth and famine; in the time of war; and in the time of plague and sickness. The prayer to be used after any other, and the thanksgivings for rain. fair weather, plenty, and deliverance from enemies, were brought in by king James the first. The prayers, in the ember weeks, for the parliament, and for all conditions of men, were added in 1661; as were also the general thanksgiving, and the thanksgiving for public peace, and for deliverance from the plague. *Gibs.* 301.

9. By the several acts of uniformity, the form of worship directed in the book of common prayer shall be used in the church, and no other; but with this proviso, that it shall be lawful for all men, as well in churches, chapels, oratories, or other places, to use openly, any psalms or prayer taken out of the Bible, at any due time, not letting or omitting thereby the service, or any part thereof, mentioned in the said book. 2 & 3 *Ed.* 6. *c.* 1. § 7.

And whereas heretofore there hath been great diversity in saying and *singing in churches* (4) within this realm, some follow-

(4) The whole law and history of devotional singing in churches is

ing *Salisbury use*, some *Hereford use*, and some the *use of Bangor*, some of *York*, some of *Lincoln*; now from henceforth all the whole realms shall have but one use. *Pref. to the Com. Pr.*

Salisbury *use*] *Lindwood*, speaking of the use of *Sarum*, says, that almost the whole province of Canterbury followeth this use; and adds as one reason of it, that the bishop of Sarum is precentor in the college of bishops; and at those times when the archbishop of Canterbury solemnly performeth divine service in the presence of the college of bishops, he ought to govern the quire, by usage and ancient custom. *Gibs.* 259.

Some Hereford *use*] In the northern parts was generally observed the use of the archiepiscopal church of York; in South Wales, the use of Hereford; in North Wales, the use of Bangor; and in other places, the use of other of the principal sees, as particularly that of Lincoln. *Ayl. Par.* 356.

The rule laid down for church music in England almost 1000 years ago, was, that they should observe a plain and devout melody, according to the custom of the church. And the rule [268] prescribed by queen Elizabeth in her injunctions was, that there should be a modest and distinct song, so used in all parts of the common prayers in the church, that the same may be as plainly understood, as if it were read without singing. Of the want of which grave, serious, and intelligible way, the *reformatio legum* had complained before. And whether some regulations may not now be necessary, to render church music truly useful to the ends of devotion, and to guard against indecent levities, seemeth to require some consideration. *Gibs.* 298, 299.

Publication of ecclesiastical matters in the church.

10. By the statute of 26 *G.* 2. *c.* 33. After the second lesson shall the banns of matrimony be published.

And by the *rubrick:* After the Nicene creed is ended, the curate shall declare unto the people what holidays or fasting days are in the week following to be observed; and then also, if occasion be, shall notice be given of the communion; and briefs,

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so ably deduced by lord *Stowell*, in *Hutchins* v. *Denziloe and another*, 1 *Hagg. Rep.* 170., that to do justice to the judgment the whole ought to be transcribed, which would exceed the limits of a note. His decision established that churchwardens could not interfere to prohibit a form of singing by the parish clerk, charity children, and congregation, authorised by the minister, and accompanied by plain congregational music, *e. g.* an organ; for if the minister introduces irregularity into the service, they may complain to the ordinary. (*Id.* 174.) And see 2 & 3 *Ed.* 6. *c.* 1. and 1 *El. c.* 2. *ante*, II. 10. in this title. The ancient hymns used in churches before the metrical version of the Psalms are by no means superseded thereby, but it is recommended by the statutes of the Reformation and the usage explanatory of them, that they should be used in the liturgy, or rather that they should be preferred to any others. (*Id.* 179, 180.)

citations, and excommunications read: and nothing shall be proclaimed or published in the church, during the time of divine service, but by the minister; nor by him any thing, but what is prescribed in the rules of this book, or injoined by the king, or by the ordinary of the place.

Preaching. (5)

11. The clergy in queen Elizabeth's time being very ignorant (and no wonder, their stipends in most places being exceeding small); and moreover the state having a jealous eye upon them, as if they were not very well affected to the Reformation; none were permitted to preach without license, but they were to study and read the homilies gravely and aptly; and they that were instituted, subscribed a promise to the same effect. And this continued in some measure in the next reign: for ministers not licensed to preach, were by the canons prohibited to expound any text of Scripture, and were only to read the homilies, even in their own cures. But the occasion of those canons being now taken away, the bishops do generally and justly forbear to put the canons as to this matter in execution; and every priest is permitted to preach, at least in his own cure, as he may and ought to do by the old canon law, and by the charge given him at his ordination, and by the very nature of his office. *Johns.* 48.

The restraints in this kind were (and are) as follows:

Arundel. No priests not being licensed shall exercise the office of preaching, until he shall be examined and sent by the bishop, and shall produce the authority by which he preacheth. *Lind.* 288.

[269] *Form of ordaining deacons:* Take thou authority to read the Gospel in the church of God, and to preach the same, if thou be thereto licensed by the bishop himself.

Form of ordaining priests: Take thou authority to preach the word of God, and to minister the holy sacraments, in the congregation where thou shalt be lawfully appointed thereunto.

Art. 23. It is not lawful for any man, to take upon him the office of public preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have pub-

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(5) A license to preach in Quebec chapel, in Mary-le-bone, was not allowed to be impeached by proceedings on the part of the lay impropriator in a *civil* suit, he not shewing an interest intitling him to maintain it. *Duke of Portland* v. *Bingham*, 1 *Hagg. Rep.* 157. A parson can neither preach, administer the sacrament, or celebrate marriage, without the bishop's license, though such license is not necessary for every particular case; but a bishop may suspend a minister wholly if he is irregular, till he submits to perform his duty properly. *Trebec* v. *Keith*, 2 *Atk.* 499. *H.* 1742.

lic authority given unto them in the congregation, to call and send ministers into the Lord's vineyard.

Can. 36. No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other place within this realm; except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first subscribe to the three articles concerning the king's supremacy, the book of common prayer, and the thirty-nine articles: and if any bishop shall license any person without such subscription, he shall be suspended from giving licenses to preach for the space of twelve months.

And by the 31 *El. c.* 6. If any person shall receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promise thereof, either to himself or to any of his friends (all ordinary and lawful fees only excepted), to procure any license to preach; he shall forfeit 40*l.* § 10.

After the preacher shall be licensed, then it is ordained as followeth:

Can. 45. Every beneficed man, allowed to be a preacher, and residing on his benefice, having no lawful impediment, shall in his own cure, or in some other church or chapel (where he may conveniently) near adjoining, where no preacher is, preach one sermon every Sunday of the year; wherein he shall soberly and sincerely divide the word of truth to the glory of God, and to the best edification of the people.

Can. 47. Every beneficed man, licensed by the laws of this realm (upon urgent occasions of other service) not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed, in the benefice where he doth not reside, except he preach himself at both of them usually. [270]

By *Can.* 50. Neither the minister, churchwardens, nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as by shewing their license to preach shall appear unto them to be sufficiently authorised thereunto, as is aforesaid.

Can. 51. The deans, presidents, and residentiaries of any cathedral or collegiate church, shall suffer no stranger to preach unto the people in their churches; except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities: and if any in his sermon shall publish any doctrine either strange or disagreeing

from the word of God, or from any of the thirty-nine articles, or from the book of common prayer: the dean or residents shall by their letters, subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient.

Can. 52. That the bishop may understand (if occasion so require) what sermons are made in every church of his diocese, and who presume to preach without license; the churchwardens and sidemen shall see, that the names of all preachers which come to their church from any other place, be noted in a book, which they shall have ready for that purpose; wherein every preacher shall subscribe his name, the day when he preached, and the name of the bishop of whom he had license to preach.

Can. 53. If any preacher shall in the pulpit particularly or namely, of purpose impugn or confute any doctrine delivered by any other preacher in the same church, or in any church near adjoining, before he hath acquainted the bishop of the diocese therewith, and received order from him what to do in that case, because upon such public dissenting and contradicting there may grow much offence and disquietness unto the people; the churchwardens or party grieved shall forthwith signify the same to the said bishop, and not suffer the said preacher any more to occupy that place which he hath once abused, except he faith-
[271] fully promise to forbear all such matter of contention in the church, until the bishop hath taken further order therein: who shall with all convenient speed so proceed therein, that public satisfaction may be made in the congregation where the offence was given. Provided, that if either of the parties offending do appeal, he shall not be suffered to preach *pendente lite*.

Can. 55. Before all sermons, lectures, and homilies, the preachers and ministers shall move the people, to join with them in prayer, in this form, or to this effect, as briefly as conveniently they may: "Ye shall pray for Christ's holy catholic church, "that is, for the whole congregation of christian people dis-"persed throughout the whole world, and especially for the "churches of England, Scotland, and Ireland. And herein I "require you most especially, to pray for the king's most ex-"cellent majesty, our sovereign lord James, king of England, "Scotland, France, and Ireland, defender of the faith, and "supreme governor in these his realms, and all other his do-"minions and countries, over all persons, in all causes, as well "ecclesiastical as temporal. Ye shall also pray for our gracious "queen Anne, the noble prince Henry, and the rest of the king "and queen's royal issue. Ye shall also pray for the ministers "of God's holy word and sacraments, as well archbishops and "bishops, as other pastors and curates. Ye shall also pray for

"the king's most honourable council, and for all the nobility "and magistrates of this realm, that all and every of these in "their several callings, may serve truly and painfully to the "glory of God, and the edifying and well governing of his "people, remembering the account that they must make. Also "ye shall pray for the whole commons of this realm, that they "may live in the true faith and fear of God, in humble obe-"dience to the king, and brotherly charity one to another. "Finally, let us praise God for all those which are departed out "of this life in the faith of Christ, and pray unto God that we "may have grace to direct our lives after their good example; "that this life ended, we may be made partakers with them of "the glorious resurrection in the life everlasting: always con-"cluding with the Lord's prayer."

The like form was injoined by the injunctions of queen Elizabeth in the year 1559; and a form of bidding was likewise prescribed (but of a different tenor from these two) by the injunctions of Edward the sixth; and also before this (and before the [272] Reformation) we find the like bidding form in English, in a *festival* printed in the year 1509, which is much longer than these, and is reprinted at length by Dr. *Burnet* in his History of the Reformation. Vol. 2. Append. p. 104.

The occasion of this kind of bidding prayer (as it is called) was, that in the ancient church silence was commanded to be kept for a time, for the people's secret prayers; and in this or such like form the minister directed the people what to pray for. A remainder of which usage is still preserved in the office of ordination of priests. 1 *Warn.* 28.

In the year 1661, there is an entry in the journal of the upper house of convocation, that the bishops unanimously voted for one form of prayer, to be used by all ministers, as well before as after sermon: and that this order was pursued in the convocation (although not brought to effect), appears from the minutes of the lower house, where on January 31. we find a committee appointed for this (among other purposes) to compile a prayer before sermon. *Gibs.* 311.

Peccham. Every priest shall explain to the people, four times a year, the fourteen articles of faith, the ten commandments, the two evangelical precepts, the seven works of mercy, the seven deadly sins with their consequences, the seven principal virtues, and the seven sacraments of grace. The fourteen articles of faith (whereof seven belong to the mystery of the Trinity, and seven to Christ's humanity) are, 1. The unity of the divine essence in the three persons of the undivided Trinity. 2. That the Father is God. 3. That the Son is God. 4. That the Holy Ghost, proceeding from the Father and the Son, is God. 5. The creation of heaven and earth by the whole and undivided

Trinity. 6. The sanctification of the church by the Holy Ghost; the sacraments of grace; and all other things wherein the christian church communicateth. 7. The consummation of the church in eternal glory, to be truly raised again in flesh and spirit; and opposite thereunto the eternal damnation of the reprobate. 8. The incarnation of Christ. 9. His being born of the Blessed Virgin. 10. His suffering and death upon the cross. 11. His descent into hell. 12. His resurrection from the dead. 13. His ascension into heaven. 14. His future coming to judge the world. The ten commandments are the precepts of the Old Testament. To these the Gospel addeth two others, to wit, the
[273] love of God, and of our neighbour. Of the seven works of mercy, six are collected out of the Gospel of St. Matthew; to feed the hungry, to give drink to the thirsty, to entertain the stranger, to clothe the naked, to visit the sick, and to comfort those that are in prison: and the seventh is gathered out of Tobias, to wit, to bury the dead. The seven deadly sins are, pride, envy, anger or hatred, slothfulness, covetousness, gluttony and drunkenness, luxury. The seven principal virtues are, faith, hope, charity, which respect God; prudence, temperance, justice, fortitude, with regard unto men. The seven sacraments of grace are, baptism, confirmation, orders, penance, matrimony, the eucharist, and extreme unction. *Lind.* 1. 43. 54.

Homilies.

12. *Rubric after the Nicene creed.* Then shall follow the sermon, or one of the homilies already set forth or hereafter to be set forth by authority.

Form of ordaining deacons. It appertaineth to the office of a deacon, to read holy scriptures and homilies in the church.

Art. 35. The second book of homilies, the several titles whereof we have joined unto this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward the sixth; and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understanded of the people.

Can. 49. No person whatsoever not examined and approved by the bishop of the diocese, or not licensed as is aforesaid for a sufficient or convenient preacher, shall take upon him to expound in his own cure or elsewhere, any scripture or matter of doctrine; but shall study to read plainly and aptly (without glossing or adding) the homilies already set forth, or hereafter to be published by lawful authority, for the confirmation of the true faith, and for the good instruction and edification of the people.

Can. 46. Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure, once in every month at the least, by preachers lawfully licensed; if his living in the judgment of the ordinary will be able to bear it. And

upon every Sunday, when there shall not be a sermon preached in his cure; he or his curate shall read some one of the homilies prescribed or to be prescribed by authority, to the intents aforesaid.

13. Besides the publication of things merely ecclesiastical, there are divers acts of parliament, and other matters temporal, required to be published in the churches. Such are these which follow: [274] Publication of acts of parliament, and other temporal matters in the church.

The act of uniformity of the 5 & 6 *Ed.* 6. is required to be read in the church by the minister once every year.

The act against swearing of the 19 *G.* 2. to be read in the church by the minister four times every year.

The act of the 12 *An. st.* 2. *c.* 18. concerning ships in distress, to be read in the church four times a year in all the sea-port towns, and on the coast, immediately after prayers and before the sermon.

The act for the observation of the fifth of November, to be read by the minister on that day, after the morning prayer or preaching.

The act for the commemoration of king Charles the second's restoration, to be read after the Nicene creed on the Lord's day next before the twenty-ninth day of May yearly.

By the 17 *G.* 2. *c.* 3. The churchwardens and overseers of the poor shall cause public notice to be given in the church, of every rate for relief of the poor allowed by the justices of the peace, the next Sunday after such allowance; and no rate shall be reputed sufficient to be collected, till after such notice given. § 1.

By the yearly land-tax acts, and by the acts for laying duties upon houses and windows, the collectors of the said tax and duties respectively shall, within ten days after their receipt of the duplicates of the assessment, cause public notice to be given in the church or chapel immediately after divine service on the Lord's day (if any such divine service shall be performed therein within that time) of the time and place appointed by the commissioners, for hearing and determining appeals against the said assessment.

Pulpit. See Church.

Purgation.

BY a provincial constitution of archbishop Langton; ecclesiastical judges shall not compel any to come to purgation at Purgation in general.

the suggestion of their apparitors, unless they be inframed by grave and good men. *Lind.* 312.

And by a constitution of archbishop Stratford; Persons defamed of crimes and excesses, and willing to purge themselves, shall not be drawn out of one deanery into another, or to places in the country where victuals and necessaries of life are not to be sold: and in the enjoining of purgation to them, not more than six compurgators shall be required for fornication, or the like crime; nor more than twelve for a greater crime, as for adultery. *Lind.* 313.

And purgation was exercised in the following manner: When any man or woman lay under a common suspicion or public fame of incontinence, or other vice; though there was not proof plain and full enough to convict them, yet were they liable to be summoned before the spiritual judge, and to be charged with the crime. If they confessed, they had a certain penance immediately enjoined them: If they denied, the judge enjoined them purgation to be performed on a day appointed, by their own oath, and by the oaths of five or six neighbours (more or less, according to the nature of the crime, and the condition of the person); and those to be of good fame and sober conversation. The oath of the person suspected was, to declare his own innocence; and the oath of the compurgators, that they believe what he swore was true. If the person came at the day appointed, together with his neighbours, and purged himself according to the rules of the church, he was dismissed, and declared innocent, and restored to his good name; but he was at the same time enjoined to avoid the cause of suspicion or the ground of the fame, for the time to come. But if he appeared not, he was declared contumacious, and proceeded against as such; or if he did appear, and could not perform purgation, (that is, either would not swear to his own innocence, or could not bring others to swear that they believed he swore true,) such failure was taken for conviction, and the judge proceeded to enjoin penance in the same manner as if the person had been duly convicted, by his own confession, or by the testimony of others. *Gibs.* 1042.

But by the 13 *C.* 2., *c.* 12. § 4. It shall not be lawful for any person exercising ecclesiastical jurisdiction, to tender or administer unto any person whatsoever, the oath usually called the oath *ex officio*, or any other oath, whereby such person to whom the
[276] same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself, of any criminal matter or thing, whereby he or she may be liable to censure or punishment.

Purgation on the benefit of

2. Anciently, upon the allowance of the benefit of clergy, the person accused was delivered to the ordinary, to make his purgation; which was to be by a jury of twelve clerks, [before

the bishop in person or his deputy: and there first the party] by his own oath affirmed his innocency; [then there were] the oaths of twelve compurgators to their belief of it; [then witnesses were to be examined on oath, on behalf of the prisoner only: and lastly, the jury were to bring in their verdict on oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded or put in penance.] 2 *H. H.* 383. *Wood's Civ. L.* 669. [4 *Bla. Comm.* 368.] clergy allowed.

But now, by the statute of the 18 *El. c.* 7. *this kind of purgation is also taken away; and the person admitted to his clergy shall not be delivered to the ordinary.* (s) [But on such allowance and burning in the hand, shall forthwith be enlarged out of prison: with proviso, that the judge may, if he think fit, continue him in gaol for any time not exceeding one year.]

Quakers. See Dissenters.

Quare impedit.

QUARE impedit is a writ that lieth, where one hath an advowson, and the parson dies, and another presents a clerk, or disturbs the rightful patron to present; then the rightful patron (although he be a purchaser, and do not claim from his ancestors) shall have this writ. But an assize of *darrien presentment* lies, where a man or his ancestors have presented before. From whence it follows, that where a man may have an assize of *darrien presentment*, he may have a *quare impedit*; but not contrariwise. *Terms of the Law.*

And it is so called, in like manner as most of the other writs in the register, from certain words in the writ respecting the special matter for which the writ is brought.

The law concerning writs of *quare impedit* is treated of under the title Advowson.

Quare incumbravit. [277]

QUARE incumbravit is a writ that lies, where two are in plea for the advowson of a church, and the bishop admits the

(s) On the subject of Purgation, see *Hob. Rep.* 290. [3 *P. Wms.* 447.] and 4 *Bla. Com.* 368.

clerk of one of them within the six months: then the other shall have this writ against the bishop. And this writ lies always depending the plea. *Terms of the L.*

Which is treated of more at large under the title **Advowson.** [And see *Com. Dig.* tit. *id.*]

Quare non admisit.

QUARE *non admisit* is a writ that lies where a man hath recovered an advowson, and sends his clerk to the bishop to be admitted, and the bishop will not receive him: then he shall have the said writ against the bishop. *Terms of the L.* [And see *Com. Dig.* tit. *id.*]

Quarrelling in the church or church-yard. See **Church.**

Querela duplex. See **Double quarrel.**

Questment. See **Churchwardens.**

Quod permittat.

QUOD *permittat* is a writ granted to the successor of a parson, for the recovery of common of pasture by the statute of the 13 *Ed.* 1. *c.* 24.; and hath its name from those words in the writ.

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Rape.

Carnally knowing a woman child under ten years.

1. IF any person shall unlawfully and carnally know and abuse any woman child under the age of ten years; every such unlawful and carnal knowledge shall be felony, and the offender shall suffer as a felon without allowance of clergy. 18 *El. c.* 7. § 4.

Taking a woman by force.

2. By the 3 *Ed.* 1. *c.* 13. The king prohibiteth, that none *do take away by force any maiden within age* (neither by her own consent nor without), nor any wife or maiden of full age, nor any other woman against her will: and if any do, at his suit that will sue in forty days, the king shall do common right; and if none commence his suit within forty days, the king shall sue; and such

as be found culpable, shall have two years' imprisonment, and after shall fine at the king's pleasure: and if they have not whereof they shall be punished by longer imprisonment, according as the trespass requireth.

Do take away by force] The taking away by force of any woman whatsoever, against her will, albeit there be no rape, is generally prohibited by this act, upon the penalty herein expressed. 2 *Inst.* 182.

Any maiden within age] This shall be taken for her age of consent, that is, twelve years old, for that is her age of consent to marriage; and the taking her away within that age, whether she consent or no, is prohibited by this act. 2 *Inst.* 182.

By the 13 *Ed.* 1. *st.* 1. *c.* 34. *Of women carried away* with the goods of their husbands; the king shall have the suit for the goods so taken away.

Of women carried away] This is to be understood of a violent taking away by any person; and so this action may be brought against women as well as men. 2 *Inst.* 435.

The king shall have the suit] Yet may the husband also have his action of trespass, both by the common law, and by the statute of the 3 *Ed.* 1. *c.* 13. 2 *Inst.* 434.

3. By the 3 *H.* 7. *c.* 2. Where women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances be oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to other by their assent, or defoiled; it is enacted, that what person that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurers to the same, and receitors, knowing the said offence in form aforesaid, be reputed and adjudged as principal felons.

Taking a woman having substance.

[279]

Where women, &c.] This act, on the offender's part, doth extend to all degrees, and to all persons: but extendeth not to all women. For on the woman's part, three things are necessarily required to make the offence felony; 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That she be taken away against her will. 3. That she be married to the misdoer, or to some other by his consent, or be defiled (that is, carnally known). For if these concur not, the misdoer is no felon within this statute, but otherwise to be punished. 3 *Inst.* 61.

Contrary to their will] It is no manner of excuse, that the woman at first was taken away with her own consent, because if she afterwards refuse to continue with the offender, and be forced

against her will, she may from that time as properly be said to be taken against her will as if she had never given any consent at all; for till the force was put upon her, she was in her own power. 1 *Haw.* 110.

And it is not material, whether a woman so taken away, be at last married or defiled, with her own consent or not, if she were under the force at the time: because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power. 1 *Haw.* 110. (6)

Receiving wittingly the same woman] But by a construction of the common law, they that receive the misdoers, and not the woman, are only accessaries, and not principal felons. 3 *Inst.* 61, 62.

Be felony] And by the 39 *El. c.* 9. The benefit of clergy is taken away from the principals, procurers, and accessaries before.

And for the proof of this felony the woman may be admitted an evidence against the misdoer, though married to him: because such marriage was founded in force and terror; and because, as such cases are generally contrived, so heinous a crime would go unpunished, unless the testimony of the woman should be received. *Gibs.* 418.

[280] And when a woman is taken by force in one county, and married in another county, the offender may be indicted and found guilty in such other county; because the continuing of the force there amounts to a forcible taking within the statute. 1 *Haw.* 10.

Taking a woman under sixteen.

4. By the 4 & 5 *P. & M. c.* 8. *It shall not be lawful* to any person to take or convey away, or cause to be taken or conveyed away, any maid or woman child unmarried, being *within the age of sixteen years*, out of the possession, custody or governance, and *against the will of her father* or of such person to whom by his will or other act he appointed her guardian; except such taking and conveying away as shall be made without fraud, by or for her master or mistress, or her guardian in socage, or guardian in chivalry. § 2.

And if any person above the age of fourteen years, shall unlawfully take or convey, or cause to be taken or conveyed any

(6) Thus the foreign marriage of a girl above the age of legal consent, but of very tender years, *viz.* twelve years and a half old, to her guardian, who seduced her from school, and though she wished to return married her in Holland and Denmark, was argued on the law as void by the *lex loci*, but was finally argued by order of the court of delegates, and declared void on the ground of force and custody. *Harford* v. *Morris*, 2 *Hagg. Rep.* 436. and 423—435. In *Trust* v. *Bowerman*, 22 Feb. 1790, *cor.* Sir *W. Wynne*, it was said that Mr. Baron *Eyre* felt great difficulty on the point of the *lex loci*. 2 *Hagg.* 436. *note.*

maid or woman child unmarried, being within the age of sixteen years, out of the possession or *against the will of her father, or mother, or guardian*; he shall on conviction and attainder, by the order and due course of the laws of this realm, be imprisoned for two years, or else pay such fine as shall be assessed by the court of star-chamber. § 3.

And if any person shall so take away, or cause to be taken away, and deflour, any such maid or woman child; or shall against the will of, or unknown to her father, if he be living, or against the will of or unknown to her mother (having the custody of her) if he be dead, *by secret letters, messages, or otherwise*, contract matrimony with her; he shall, being thereof lawfully convicted as aforesaid, be imprisoned for five years, or else pay such fine as shall be assessed by the said court. The one moiety of which fine shall be, half to the king, and half to the party grieved. § 4.

And the king and queen's *honourable council of the star chamber*, by bill of complaint or information, and justices of assize by inquisition or indictment, shall have power to hear and determine the said offences; upon every which indictment and inquisitions such process shall be awarded, as upon an indictment of trespass at common law. § 5.

And if any woman child, or maiden, being above the age of twelve years, and under the age of sixteen, do consent or agree to such person that shall so make any contract of matrimony; her next of kin, to whom the inheritance shall come after her decease, shall have all such lands as she had in possession, reversion, or remainder at the time of such assent, during the life of such person that shall so contract matrimony; and after her decease the [281] same shall come to such person as they should have done in case this act had not been made, other than to him only that so shall contract matrimony. § 6.

Provided, that this shall not extend to any orphans in London, or any other city, borough, or town, where orphans are commonly provided for by grant or custom; but the lord mayor and aldermen of London, and the head officers in other cities, boroughs, or towns, may take such order therein as they have been wont. § 7.

It shall not be lawful] This clause is but a declaration of the common law; by which any person might be fined and imprisoned for the offence therein specified and contained: and the statute is only an aggravation of punishment, and doth not create an offence. *Gibs.* 419.

Against the will of her father] *H.* 15 *G.* 2. *K.* against *Cornforth and others.* The court granted an information against the defendants for taking away a *natural* daughter under sixteen, un-

der the care of her putative father; being of opinion it was within this statute. *Str.* 1162.

Against the will of her father, or mother, or guardian] In the case of *Twisleton* and *King*, *M.* 20 *C.* 2., it was alleged that the girl consented to go; but the court took no notice of that: and it being plainly against the will of the parents, the jury were directed to find the parties guilty. 2 *Keb.* 432.

By secret letters, messages, or otherwise] The mother of one Tibboth, fearing that her only daughter might be stolen, entreated the lady Gore to take her into her family; who married her (being under the age of sixteen) to her son, without the consent of the mother, who was also her guardian. But the estate being sued for by Hicks according to the tenor of the statute, and it appearing to the court that the marriage was solemnized by a lawful minister in the church, at a canonical hour, before several people, and while the church doors were open; the case was found not to be within the design and intention of this statute: nor could the plaintiff prove any thing to make a forfeiture: so he was nonsuit. *Gibs.* 420.

Honourable council of the star-chamber] It is declared in *Moor's* case, that inasmuch as there are no negative words in this new conveyance of power to the star-chamber, and the court of king's bench had a right to hear and determine before the statute; the same power which they had by the common law still remaineth to them, notwithstanding the statute; and that so it would have
[282] been, though the court of star chamber had still continued. And it appears that one Story was fined 100*l.* by the court of king's bench, for taking away a young woman under sixteen out of her mother's custody; and two women who were assistants 50*l.* each; and all bound to the good behaviour, the first for five years, and the two others for one year. *Gibs.* 420.

Ravishment.

By the 13 *Ed.* 1. *st.* 1. *c.* 34. If a man do ravish a woman married, maid or other, where she did not consent, neither before nor after; *he shall have judgment of life and of member:* And where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after; he shall have such judgment as before is said, *if he be attainted at the king's suit*, and there the king shall have the suit.

He shall have judgment of life and of member] That is, he shall be attainted of felony. And this is to be understood, upon an appeal to be brought by the party ravished. But if she did consent, either before or after, she shall have no appeal. 2 *Inst.* 433, 434.

If he be attainted at the king's suit] And not at the suit of the party upon an appeal, as in the former case: for here it is supposed, that she consenteth afterwards; which barreth her appeal. 2 *Inst.* 434.

By the 6 *R.* 2. *c.* 6. Against the offenders and ravishers of ladies, and the daughters of noblemen, and other women, it is ordained, that wheresoever they be ravished, and after such rape do consent to such ravishers, that as well the ravishers, as they that be ravished, be from thenceforth disabled to have or challenge all inheritance, dower, or join feoffment, after the death of their husbands and ancestors. And the next of blood shall have title immediately after such rape to enter. And the husbands of such women, if they have husbands, or if they have not then their fathers or other next of blood, *shall have their suit* against the ravishers, to have them thereof convict of life and member, although the same woman after such rape do consent to the ravisher: And the defendant shall not wage battle, but be tried by inquisition of the country. Saving to the king and other lords the escheats of such ravishers, if they be thereof convict.

Shall have their suit] That is, *by appeal.* (7)

By the 18 *El.* *c.* 7. For the repressing of the most wicked and felonious rapes or ravishments of women, maids, wives, and damsels; it is enacted, that if any person shall commit any manner of felonious rape or ravishment, he shall be guilty of felony without benefit of clergy.

And all rapes are commonly excepted out of the acts of general pardon. [283]

Rate for the repair of the church. See **Church**.

Reader.

THE office of reader is one of the five inferior orders in the Romish church. (8)

And in this kingdom, in churches or chapels where there is only a very small endowment, and no clergyman will take upon him the charge or cure thereof; it hath been usual to admit readers, to the end that divine service in such places might not altogether be neglected.

It is said, that readers were first appointed in the church about the third century. In the Greek church they were said to have been ordained by the imposition of hands: But whether

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(7) And now by 59 *G.* 3. *c.* 46. § 1. Appeals of any offence are abolished.

(8) The term "reader" is made use of by canon law: but a reader known to canon law is always put in opposition to a clergyman. Per lord *Mansf.* *Cowp.* 444.

this was the practice of all the Greek churches hath been much questioned. In the Latin church it was certainly otherwise. (9) The council of Carthage speaks of no other ceremony, but the bishop's putting the Bible into his hands in the presence of the people, with these words, "Take this book, and be thou a reader "of the word of God; which office, if thou shalt faithfully and "profitably perform, thou shalt have part with those that mi-"nister in the word of God." And in Cyprian's time, they seem not to have had so much of the ceremony as delivering the Bible to them, but were made readers by the bishop's commission and deputation only, to such a station in the church. *Bing. Antiq.* V. 2. p. 31.

Upon the reformation here, they were required to subscribe to the following injunctions:

"*Imprimis*, I shall not preach or interpret, but only read that which is appointed by public authority:

I shall not minister the sacraments or other public rites of the church, but bury the dead, and purify women after their child-birth:

I shall keep the register book according to the injunctions:

I shall use sobriety in apparel, and especially in the church at common prayer:

I shall move men to quiet and concord, and not give them cause of offence:

[284] I shall bring in to my ordinary testimony of my behaviour, from the honest of the parish where I dwell, within one half year next following:

I shall give place upon convenient warning, so thought by the ordinary, if any learned minister shall be placed there at the suit of the patron of the parish:

I shall claim no more of the fruits sequestered of such cure where I shall serve, but as it shall be thought meet to the wisdom of the ordinary:

I shall daily at the least read one chapter of the Old Testament, and one other of the New, with good advisement to the increase of my knowledge:

I shall not appoint in my room, by reason of my absence or sickness, any other man; but shall leave it to the suit of the parish to the ordinary, for assigning some other able man:

I shall not read but in poorer parishes destitute of incumbents, except in the time of sickness, or for other good considerations to be allowed by the ordinary:

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(9) In Wales, in many parts of England, and in colleges, persons officiate as readers who are not in orders. *Cowp.* 439. 444. But 57 *G.*3. *c.* 99. § 15. assumes certain readers to be in orders. See *infra*, Residence.

I shall not openly intermeddle with any artificers' occupations, as covetously to seek a gain thereby; having in ecclesiastical living the sum of twenty nobles or above by the year."

This was resolved to be put to all readers and deacons by the respective bishops, and is signed by both the archbishops, together with the bishops of London, Winchester, Ely, Sarum, Carlisle, Chester, Exeter, Bath and Wells, and Gloucester. *Stryp's Annals*, V. 1. p. 306.

By the foundation of divers hospitals, there are to be readers of prayers there, who are usually licensed by the bishop. (1)

Reading desk. See Church.
Refusal. See Benefice.

Register. [285]

SO far as this officer is to be considered solely in the capacity of a notary public, see the title Notary Public.

1 *Can.* 123. No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such

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(1) [In *Martyn* v. *Hind*, *Cowp*. 437.] a rector by certificate to the bishop, appointed Martyn, curate of his parish, with a salary of 50 guineas, until he should be otherwise provided of some *ecclesiastical preferment*. Martyn was afterwards appointed to the readership of the parish, for which he had 30*l*., by order and at the will of the vestry. Held, that this readership is not an ecclesiastical preferment within the meaning of the certificate. [*Watson on the Canon Law*, states, that there are but two ways of being provided for by the church without being an incumbent of it, *viz*. "being a curate, or a lecturer." They are both taken notice of by law: they must be licensed, they must subscribe the articles and make the declaration; but a priest employed by any body to read prayers wants no authority, for that is given him by the very ordination: he wants no license, he signs no articles, the bishop cannot inhibit him, and the office is temporal. See *Cowp*. 444, 445.]

By the 13 & 14 *Car*. 2. *c*. 4. § 8. Readers in the *Universities* are required to sign the declaration contained in § 9., which is still in force so far as respects the liturgy [not being repealed by 13 & 14 *C*. 2. *c*. 4. § 12. now expired, or 1 *W*. & *M*. *c*. 8. § 11. now in force: and is as follows, "I *A*. *B*. do declare, that I will conform to the liturgy "of the church of England as it is now by law established."].

persons as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto*.

And this is according to the rule of the ancient canon law; which, to prevent falsifications, requireth the acts to be written by some public person (if he may be had), or else by two other credible persons: and the credit which the canon law gives to a notary public is, that his testimony shall be equal to that of two witnesses. *Gibs.* 996.

2. *Can.* 134. If any register, or his deputy or substitute whatsoever, shall receive any certificate without the knowledge and consent of the judge of the court; or willingly omit to cause any person (cited to appear upon any court day) to be called; or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the judge; or do not obey and observe the judicial and lawful monition of the said judge; or omit to write or cause to be written such citations and decrees as are to be put in execution and set forth before the next court day; or shall not cause all testaments exhibited into his office, to be registered within a convenient time; or shall set down or enact, as decreed by the judge, any thing false or conceited by himself, not so ordered or decreed by the judge; or in the transmission of processes to the *judge ad quem*, shall add or insert any falsehood or untruth, or omit any thing therein, either by cunning or by gross negligence; or in causes of instance, or promoted of office, shall receive any reward in favour of either party, or be of council directly or indirectly with either of the parties in suit; or in the execution of their office shall do ought else maliciously, or fraudulently, whereby the said ecclesiastical judge or his proceedings may be slandered or defamed: we will and ordain, that the said register, or his deputy or substitute,
[286] offending in all or any of the premises, shall by the bishop of the diocese be suspended from the exercise of his office, for the space of one, two, or three months or more, according to the quality of his offence; and that the said bishop shall assign some other public notary to execute and discharge all things pertaining to his office, during the time of his said suspension.

3. Dr. Godolphin says, if there be a question between two persons touching several grants, which of them shall be register of the bishop's court; this shall not be tried in the bishop's court, but at the common law; for although the *subjectum circa quod* be spiritual, yet the office itself is temporal. *God.* 125.

So in the case of *K.* and *Ward*, *H.* 4 *G.* 2. There was a mandamus to Dr. Ward the commissary, to admit Henry Dryden to be deputy register of the archbishop of York's court; suggesting that Dr. Thomas Sharpe had been admitted to the office, to execute the same by himself or his deputy; that he had appointed Dryden (who is averred to be a fit person) to be his

deputy, whom the commissary had refused to admit, to the great damage of Dr. Sharpe, who complains; and therefore the writ commands the commissary to admit and swear Dryden, or shew cause to the contrary. To this the commissary returns: that long before the constituting Dryden to be deputy, John Sharpe and Thomas Sharpe were admitted to the office as principals, to hold for their lives, and the life of the survivor; that they, in the year 1714, appointed John Shaw to be their deputy, who executed the office till John Sharpe died; that Thomas Sharpe survived, and on May 12, 1727, by a new appointment constituted Shaw his deputy, who was admitted, and executed the office until suspended in the manner after mentioned; that Shaw at the time of his admission took an oath, that he should justly and honestly execute the office, without favour or reward, and do every thing incumbent on the office, and not be an exacter or greedy of rewards; and then sets forth the 134th canon; and further, that whilst Shaw was deputy, several proctors of the court on the sixteenth of February, 1727, exhibited to the commissary several articles against him, complaining of divers misbehaviours in his office, contrary to several of the particulars set forth in the said canon; that Shaw being summoned on the sixth of April, 1728, gave in his answer in writing (which is set forth); and then the return goes on, that forasmuch as it appeared to the commissary that the answer was insufficient, and that Shaw had confessed himself guilty of several omissions and extortions [287] in the exercise of his office, therefore upon complaint thereof to the archbishop, he on the twenty-first of May, 1728, by his commission under his archiepiscopal seal directed to the commissary, and reciting that Shaw had been guilty in the manner before-mentioned, doth therefore impower the commissary to suspend him and assume another notary public; that by virtue thereof, he on the twenty-fourth of May, 1728, suspended Shaw for five years, and assumed Joseph Leech a notary public, who, before the constituting Dryden to be deputy, took upon him and hath ever since executed the office; that Shaw appealed, and in that appeal alleged, that on the twenty-third of May, 1728, he resigned the office, and that Dr. Sharpe had appointed William Smith to be deputy; that delegates were appointed, who, on the twenty-third of October, 1728, issued an inhibition to the commissary, that pending the appeal he should do nothing to the prejudice of the appellant; that the appeal remains undetermined; and for these reasons he cannot admit Dryden to be the deputy of Dr. Sharpe. Strange argued, that the return was ill, and that there ought to be a peremptory mandamus; which argument was to the following effect: "I must observe in general, that there is no incapacity returned in Dryden, no want of any regular appointment or deputation; on the contrary, it appears

that Dr. Sharpe had a power to make a deputy, and that he hath executed it with regard to Dryden: As therefore Dryden hath *primâ facie* a regular title to the office, the commissary who is to admit him ought not to refuse to do his duty; especially considering that the admission gives no right, but only a legal possession, to enable him to assert his right if he has any: And upon this foundation it is, that *non fuit electus* hath been held no good return to a mandamus to swear in a churchwarden, because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party hath a right, he ought to be admitted; if he hath not, the admission will do him no good: This effect of a mandamus to admit, was laid down in the case of *The King* against *The Dean and Chapter of Dublin*, *H.* 7 *G.*, which was a mandamus to admit one Dougate to his seat in the choir and his voice in the chapter; for wherever the office is but ministerial, he is to execute his part, let the consequence be what it will: In the case of *The King* and *Simpson*, *M.* 11 *G.*, there was a mandamus to the archbishop of Colchester, to swear Rodney Fane into the office of churchwarden; the [288] archdeacon returned, that before the coming of the writ he received an inhibition from the bishop; but the court held, that was no excuse, and that a ministerial officer is to do his duty, whether the act will be of any validity or not: In the case of *Taylor* and *Raymond*, *M.* 4 *G.*, to a mandamus to swear in a churchwarden, it was returned, that before the coming of the writ he had sworn in another, and it was held an ill return; for be the right which way it will, the officer is to do his duty: These two last cases are both in point; in one there was an inhibition (as there is in this case), and in the other there was another officer, as they pretend there is here, to wit, Joseph Leech: But what is that inhibition? it is, to do nothing that may prejudice the appeal: Can this hurt Shaw? no; if he is relieved on the appeal, he will be restored, though another is admitted; if he is not relieved, it must be for want of a right, and he will not be capable of suffering any prejudice by the other's admission: But what takes off all pretence of the inhibition's being material in this case is, that it appears by Shaw's own shewing, that he had the day before his suspension surrendered his deputation; and that accounts for the last part of the return, that the appeal is undetermined; it not being of any consequence to Shaw to prosecute it any further; besides, this would be to deprive Dr. Sharpe of the benefit of this office as long as Shaw should think fit to sleep upon the appeal, Dr. Sharpe having no power to expedite the determination: A deputy is but at will: and this is to deprive Dr. Sharpe of his will for five years; which suspension I take to be illegal; for the expression in the canon of such a number of months *or more*, must have a reasonable construction, and can never be extended

to five years: Shaw is entirely divested of the office, which answers the purpose of reformation better than a bare suspension: As therefore the office is vacant, there can be no reason why the commissary should refuse to fill it up; and a peremptory mandamus ought to go." And by the court: "Surely it is attempting too much, to support this as a good return; the effect of a mandamus, as laid down, is certainly so, that it gives no right. The canon only intended, that the bishop should suspend where the principal would not revoke; but an actual revocation is better than a suspension: It would be carrying the power of inhibitions a great way, if we should allow them the force contended for by the return: We are therefore all of opinion that the return is ill." Then exception was taken to the writ, that a mandamus would not lie for a deputy; and for this [289] was cited 6 *Mod.* 18. where *Holt* chief justice lays it down, that for a deputy a mandamus will not lie: But it was answered, that this is not a mandamus for the deputy, but for the principal to be admitted to have a deputy; the refusal of Dryden is laid to be, to the great damage of Dr. Sharpe, and therefore to do Dr. Sharpe right in the premises is the writ awarded; it appears Dr. Sharpe has a freehold in the office, so though his deputy is but at will, he hath it for life; and in 1 *Ventr.* 110. a mandamus was granted to restore a person to the office of deputy steward of the court of the council of the Marches, and it was held to lie for a revocable deputy, because the principal hath no other way to get him admitted; and in the report of the same case in 1 *Lev.* 306. it is said by the court, that although a mandamus doth not lie for a deputy, yet it lies for him who deputes him, to have him admitted or restored, for otherwise he may be deprived of his power to make a deputy. Then it was further objected, that a mandamus doth not lie for a spiritual office; and for this were cited divers cases, where it was determined that a mandamus will not lie for a proctor, who belongeth as much to the ecclesiastical court as the register doth: Unto which it was answered, that this is not any objection; a mandamus hath been granted to admit an under-schoolmaster, and yet schoolmasters are within the canons of 1603 as well as registers; so in the case of Mr. *Folks* lately, for the office of apparitor-general of the archbishop of Canterbury; so it hath been often granted for a parish clerk; for a sexton; so in like manner it was granted to restore Dr. Bentley to his degrees; and to admit Dr. Sherlock to a prebend at Norwich: and it is to be observed, that no assize will lie for this office; therefore if the party hath not this remedy, he hath none. The reason why it was refused to a proctor was, because it did not appear what interest he had; but here appears a freehold. And by the court: "We all think this writ is good,

notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go." *Str.* 893.

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Register book.

Of registers in general.

1. THE keeping of a church book, for the age of those that should be born and christened in the parish, began in the thirtieth year of king Henry the eighth, [by the instigation of Lord Cromwell, who at that time, as vicar-general to the king, was vested with all the power that the pope's legates formerly had; and all wills that were above 200*l.* value were to be proved in his court. And therefore it served his purpose to set on foot a registry of all persons that were christened and buried; and his might be very well appointed by authority of the king, as supreme head of the church; since these are ecclesiastical acts; and when a book was appointed by public authority, it must be a public evidence. *Bac. ab.* tit. *Evidence* (F.) 6th *ed.* 632, 3.] *God.* 144, 145. 3 *Burnet*, 139.

And the following canon, in the main of it, was only a reinforcement of one of the Lord Cromwell's injunctions in the year 1538; which was continued in those of king Edward the sixth, and of queen Elizabeth; in whose reign a protestation being appointed to be made by ministers at institution, one head of it was —— I shall keep the register book, according to the queen's majesty's injunctions. *Gibs.* 204.

By *Can.* 70. In every parish church and chapel within this realm, shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of *every christening, wedding, and burial,* which have been in the parish since the time that the law was first made in that behalf, so far as the antient books thereof can be procured, but especially since the beginning of the reign of the late queen. And for the safe keeping of the said book, the churchwardens, at the charge of the parish, shall provide one sure coffer, and three locks and keys; whereof one to remain with the minister, and the other two with the churchwardens severally; so that neither the minister without the two churchwardens, nor the churchwardens without the minister, shall at any time take that book out of the said coffer. And henceforth, upon every sabbath day, immediately after morning or evening prayer, the minister and churchwardens shall take the said parchment book out of the said coffer, and the minister in the presence of the churchwardens shall write and record in the said book the names of all persons christened, together with the names and surnames of their parents, and also the names of all

persons married and buried in that parish, in the week before, and the day and year of every such christening, marriage, and burial; and that done, they shall lay up that book in the coffer as before: And the minister and churchwardens, unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names. And the churchwardens shall once every year, within one month after the five and twentieth day of March, transmit unto the bishop of the diocese or his chancellor, a true copy of the names of all persons christened, married, or buried in their parish in the year before (ended the said five and twentieth day of March), and the certain days and months in which every such christening, marriage, and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop; which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in performance of any thing herein contained; it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemners of this our constitution. (2)

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(2) By 6 & 7 *W*. 3. *c*. 6. § 21. Every person in holy orders shall within their respective parishes and places take an exact account, and *keep a register in writing of every person married, christened, or born* therein, or buried in the common burying places, where parishioners are buried; to view which book and register, all parties concerned shall have free access at seasonable times without fee: and every minister who shall not keep a true register thereof as above shall forfeit 100*l*., recoverable in any court at Westminster by action of debt or information without essoin, &c. to go in moieties to his majesty and the party suing, with full costs to the latter. *And* by 9 & 10 *W*. 3. *c*. 35. § 4. the words, "persons in holy orders," shall comprehend *bishops*, in all cases where any marriages are celebrated, or the offices for any christenings or burials are performed by them.

And now, by 52 *G*. 3. *c*. 146. "*For better regulating and preserving parish and other registers of births, baptisms, marriages, and burials in England*," it is enacted, That after 31 Dec. 1812, registers of public and private baptisms, marriages, and burials, solemnized according to the rites of the united church of England and Ireland within all parishes or chapelries in England, whether subject to the ordinary, peculiar, or other jurisdiction, shall be kept by the rector, vicar, curate, or officiating minister of every parish (or of any chapelry where baptisms, marriages, and burials have usually been performed), in books of parchment, [only if required by churchwardens, § 2.] or of durable paper, to be provided by his majesty's printer, at the expense of the parishes, &c.; whereon shall be printed on each side of every leaf, the heads of information herein required to be entered in the registers of baptisms, &c. respectively, every entry being numbered progressively, from beginning to the end of each book, and being divided from the next entry by a printed line, according to the forms in schedule A,

Of marriages in particular

[By 4 *G.* 4. *c.* 76. § 28. "In order to preserve the evidence of "marriages, and to make the proof thereof more certain and

B, C, and every page being numbered progressively at the middle of the top. § 1.

A printed copy of this act, with one book so prepared, as in § 1. and adapted to the form of the register of baptisms in schedule A., and one other to that of marriages in schedule B., and one other to that of burials in schedule C., shall be transmitted by his majesty's printer to the officiating ministers of the several parishes in England, who shall use them for the purposes of this act, which books shall be proportioned to the population of the several parishes, &c. according to the last returns; and other like books shall, when necessary, be furnished by the church or chapel wardens, at the expense of the parish, &c. whenever required by the rector, &c. or officiating minister, and shall be of paper, unless required to be of parchment by such church or chapel wardens. § 2.

Such registers shall be kept in such separate books, and such pastor, &c. or officiating minister, shall, as soon as possible, (and never later than 7 days, unless prevented by sickness or unavoidable impediment), after the solemnization of every private or public baptism, or burial, enter, in a legible hand-writing in the proper register book, the required particulars, and sign the same. § 3.

Whenever the ceremony of baptism or burial is performed in any other place than the church or churchyard of a parish chapel, or chapel yard of any chapelry providing its own distinct registers, by any other minister than the rector, curate, &c. thereof, the minister performing the same shall, on that or the next day, transmit to such rector, &c. or his curate, a certificate of such baptism or burial, as in schedule D., who shall thereupon enter the same in such book, adding to such entry, "according to the certificate of the Rev. ——, transmitted to me on the —— day," &c. § 4.

The above books of entries, and all register books heretofore in use, shall belong to every such parish or chapelry, and shall be safely kept by the rector, &c. or officiating minister thereof, in a dry well-painted iron chest, provided and repaired at the expense of the parish, &c. and which shall be constantly kept locked in some dry and safe place in his house, if resident within the parish, &c. or in the church or chapel; and shall not be removed therefrom, except for making the above entries, and for inspection of persons desirous to search the same, or to obtain copies thereof, or to be produced as evidence in some court, or for inspection into their state, or for the purposes of this act, and immediately after, shall be forthwith returned into the chest. § 5.

At the expiration of 2 months after every year's end, fair copies of all the entries of baptisms, marriages, and burials, solemnized in the year preceding, shall be made by the officiating minister (or church or chapel wardens, clerk, or other person under his direction) on parchment (as in the said schedules), to be provided by the parishes, and the contents thereof shall be verified by such minister, in the form following:

'I *A. B.* rector [*or as the case is*] of the parish of *C.* [*or* of the

" easy, and for the direction of ministers in the celebration of " marriages and registering thereof," it is enacted, That from

chapelry of *D.*] in the county of *E.*, do hereby solemnly declare, that the several writings hereto annexed purporting to be copies of the several entries contained in the several register books of baptisms, marriages, and burials of the parish or chapelry aforesaid, from the — day of — to the — day of —, are true copies of all the several entries in the said several register books respectively, from the said — day of — to the said — day of —, and that no other entry during such period is contained in any such books respectively, [*a blank here. Qu.* " which entries?"] are truly made according to the best of my knowledge and belief. (Signed) *A. B.*'
Which shall be fairly written, without stamp on the said copy, immediately after the last entry therein, and the signature thereto shall be attested by one at least of the church or chapel wardens. § 6.

Copies of such register books, verified and attested as above, shall be transmitted by the church or chapel wardens, after having been signed by one of them, by the post, to the registrars of the diocese, on or before 1st June in each year. § 7.

The registrar of every diocese in England shall, on or before 1st July in each year, make a report to the bishop, whether the copies of the above registers have been sent to such registrar, as in § 6, 7. required; and in event of failure to transmit such copies, the registrar shall specially state the default of the parish, in his report to the bishop. § 8.

If the officiating minister of any parish or chapelry neglect to verify and sign such copies and declaration as in § 6., so that the church-wardens cannot transmit the same as in § 7., the latter shall within the time limited in § 7. certify such default to the registrar, who shall specially state the same in his report to the bishop. § 9.

In all cases of baptism or burial in any extra-parochial place, in England, according to the established church, where there is no church or chapel, the officiating minister shall, within one month after such baptism or burial, deliver to the rector, vicar, or curate of such parish immediately adjoining to such extra-parochial place as the ordinary shall direct, a memorandum of such baptism, signed by such [*qu.?* but the act is so] parent of the child baptised, or of such burial, signed by the person employed therein, with two of the persons attending the same, as the case may require, containing the particulars hereinbefore required, which memorandum so delivered shall be entered in the parish register. § 10.

The superscription on all letters containing the copies of the parish and other registers to be transmitted as in § 7. shall be indorsed and signed by the church and chapel wardens as in schedule E., and shall go postage free. § 11.

As often as the copies of such registers and lists are transmitted to the office of the registrars, they shall cause them to be safely kept from damage, and to be so arranged as to be resorted to when required, and shall cause correct alphabetical lists to be made in books of the names of all persons or places therein, which, with the above

and after 1st Nov. 1823, all marriages shall be solemnized in the presence of two or more credible witnesses, besides the

copies, shall be open to public search, at reasonable times, on payment of the usual fees. § 12.

Report by the bishop and the *custos rotulorum* to the privy council before 1st March 1813, respecting proper places for the preservation of copies of register books, as well as original wills in each diocese, and for remuneration of registrar's offices. § 13. [Exp.]

Every person who shall knowingly and wilfully insert, or cause or permit, &c. in any such register of such baptisms, burials, or marriages, or in any such copy (as in § 6.), or in any list or declaration ordered to be transmitted to such registrars, any *false entry* of any thing relating to any baptism, burial, or marriage, or who shall falsely make, utter, forge, or counterfeit, or cause, procure, or wilfully permit, &c. any part of such register, list, or declaration, or copy of such register, or who shall wilfully destroy, deface, or injure, or cause to be destroyed, any such register, or part thereof, or shall wilfully sign or certify any copy of any such register required to be transmitted as in § 6., which is false in any part thereof, knowing it to be false, shall be deemed guilty of felony, and transported for 14 years. § 14.

No rector, &c. or officiating minister of any parish or chapel who shall discover any error to have been committed in the form or substance of the entry in the register book of any such baptism, burial, or marriage respectively by him solemnized, shall be liable to the penalties in § 14. if he shall, within one calendar month after discovery of such error, in presence of the parent or parents of the child baptized, or of the parties married, or of two persons who attended at any burial, or in case of the death or absence of the respective parties, then in presence of the church or chapel wardens (who shall attest the same), alter and correct the entry which was found erroneous, according to the case, by entry in the margin of such book wherein such erroneous entry is made, without alteration of the original entry; and he shall sign such entry in the margin, and add to such signature the day of the month and year when such correction is made, provided that in the fair copy of the registers transmitted to the registrars of the dioceses the officiating minister shall certify the alterations so made by him. § 15.

Nothing herein shall increase or diminish the fees payable to any minister for performance of any of the above duties, or to him or any registrar for giving copies of such registrations, but the same, and the power of recovering the same, shall remain as before this act. § 16.

No duplicate or copy of any such register made under this act shall be chargeable with stamp duty. § 17.

One-half the penalties levied under this act shall go to the informer or party suing; and the remainder of those imposed on any church or chapel warden, shall go to the poor of the parish or place; and the remainder of those imposed on any rector, &c. minister, or registrar, to such charitable purposes in the county as the bishop shall appoint. § 18.

minister who shall celebrate the same; and that immediately after the celebration of every marriage, an entry thereof shall be made in such register to be kept as aforesaid; in which entry or register it shall be expressed, that the said marriage was celebrated by banns or license; and if both or either of the parties married by license be under age, not being a widower or widow, with consent of the parents or guardians as the case shall be; and such entry shall be signed by the minister with his [292
proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form or to the effect following:

Lists of extant register books shall be transmitted to registrar before 1st June, 1813. § 19. [Exp.]

This act shall extend to cathedral and collegiate churches, chapels of colleges, or hospitals and burying grounds belonging thereto, and to the ministers who shall officiate therein, and shall baptise, marry, or bury any persons, although such churches, &c. and such ministers be not parochial, and there be no churchwardens thereof; and in all such cases the books in § 1. directed to be provided, shall be got at the expense of the body appointing the officiating minister, and copies thereof shall be transmitted to the registrar of the diocese by such minister, as in § 7. directed, attested by two officers of such church, &c. as by § 6. directed, in respect of churchwardens; but this act shall not repeal 26 *G.* 3. *c.* 33. (Marriage) § 20.

SCHEDULE (A).

BAPTISMS solemnized in the parish of *St. A.* in the county of *B.* in the year one thousand eight hundred and thirteen.

When baptized.	Child's Christian Name.	Parents' Name.		Abode.	Quality, Trade, or Profession.	By whom the Ceremony was performed.
		Christian.	Surname.			
1813. 1st *February* No. 1.	*John Son of*	*William Elizabeth.*		*Lambeth.*		
3d *March* No. 2.	*Ann Daughter of*	*Henry Martha.*		*Fulham.*		

A. B. of [the / this] parish ——————— and C. D. of [the / this] parish ——————— were married in this [church / chapel] by [banns / licence] with consent of [parents / guardians] this ——————— day of ——————— in the year ——————— By me J. J. [Rector / Vicar / Curate]

This marriage was solemnized between us [A. B. / C. D.] in the presence of [E. F. / G. H.]

Forging or destroying register of marriage, [or forging, or uttering forged license.]

And if any person shall, [from and after 1st Nov. 1823,] with intent to elude the force of this act, knowingly and wilfully insert or cause to be inserted in the register book of such parish or chapelry as aforesaid, any false entry of any matter or thing relat-

SCHEDULE (B).

MARRIAGES solemnized in the parish of *St. A.* in the county of *B.* in the year one thousand eight hundred and thirteen.

A. B. of { *the* / *this* } parish.
and *C. D.* of { *the* / *this* } parish.
were married in this { *church* / *chapel* } by { *banns* / *licence* } with consent of { *parents* / *guardians* }
this day of in the year

By me, *I. I.* { *rector* / *vicar* / *curate* }

This marriage was solemnized between us { *A. B.* / *C. D.* }

In the presence of { *E. F.* / *G. H.* }

SCHEDULE (C).

BURIALS in the parish of *A.* in the county of *B.* in the year one thousand eight hundred and thirteen.

Name.	Abode.	When buried.	Age	By whom the Ceremony was performed.
John Williams, No. 1.	*Duke Street, Westminster.*	1813. 1st *May.*	62.	

ing to any marriage; or falsely make, alter, forge or counterfeit any such entry in such register, or cause or procure the same to be done, or act or assist therein; or falsely alter, forge, or counterfeit any license of marriage, or cause to procure the same to be done, or act or assist therein; or utter or publish as true any such false, altered, forged, or counterfeited register as aforesaid, or a copy thereof, or any such false, altered, forged, or counterfeited license of marriage, knowing the same to be false, altered, forged, or counterfeited; or shall wilfully destroy, or cause or procure to be destroyed, any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; he shall be deemed guilty of felony, and shall suffer transportation for life, according to the laws in force for transportation of felons. § 29. (3)

E. 6. *G.* 2. *Dormer* and *Ekyns.* B. R. Motion for an information against B. a rector, and a curate of a church, for refusing to give Mr. Dormer copies of certain parts of a register belonging to that parish, and likewise for refusing to give him a certificate of certain persons of his family, born in that parish. The court said, "You have a right to inspect the public books of the parish; but cannot oblige the rector or curate to make you out either copies of those books, or a certificate;" for which reason they could not grant the motion. Upon this he changed his motion, and desired a rule to inspect those books. The court said, motions to inspect the public books of corporations, they grant without an affidavit; but in motions to inspect the [293] Evidence.

SCHEDULE (D).

I do hereby certify, that I did on the day of baptize according to the rites of the united church of *England* and *Ireland*, son (*or daughter*) of and his wife, by the name of
To the rector [*or as the case may be*] of

I do hereby certify, that on the day of *A. B.* of aged was buried in [*stating the place of burial*], and that the ceremony of burial was performed according to the rites of the united church of *England* and *Ireland*, by me,
To the rector [*or as the case may be*] of

SCHEDULE (E).

To the registrar of the diocese of
at

A. B. } Churchwardens (*or* chapelwardens) of the parish (*or* chapelry) of
C. D. } [*or such other description as the case shall require*].

(3) Before 26 *G.* 2. *c.* 33. § 16. now repealed by 4 *G.* 4. *c.* 76. § 1. and replaced as above, in the nearly similar words of § 29. of the latter act, on an indictment for entering a false marriage in the register book, the defendant was fined 200 marks. 2 *Siderf. Rep.* 71, 72.

public books of a parish, an affidavit is always requisite. By such affidavit, they said, too, it must be sworn, that the copies of them are necessary to be produced in evidence at a trial of a cause depending, and likewise that the inspection of those books to take copies has been demanded and refused. Now, in the present case, the first part was sworn to, but not the latter; for which reason the court refused to make any rule at present. *2 Barnard.* 269.

[Parish registers are for some purposes considered as public books; and persons interested in them have a right to inspect and take copies of such parts of them as relate to their interest. (4) A parish register has been received in evidence as an original authentic book, although the constant practice of the parish was to make a memorandum of the christenings in a day-book, from which entries were some time afterwards made into the registry. (5) The question arose on the plaintiff's legitimacy: and on his part a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared that the practice was to make the entries in this register once in three weeks out of a day-book in which entries were made immediately after the christening on the same morning; and in the case of illegitimate children, to insert in the entry the letters B. B., which were intended to signify "Base Born." The defendant's counsel then offered in evidence the day-book from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry.—But a majority of the judges present at a trial at bar, were of opinion, that such evidence ought not to be received, on the ground, that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register. If indeed the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible, as the declaration of a deceased parent on a question of legitimacy; for the declarations of deceased persons supposed to have been married, (who might themselves be examined if alive,) are admissible to disprove the fact of marriage. (6) But if on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register, (and of that nature it

(4) *Geery* v. *Hopkins*, 2 *Ld. Raym.* 851. *Warriner* v. *Giles*, 2 *Stra.* 954. *Mayor of London* v. *Swinland*, 1 *Barnardist.* 454. and see now 52 *G.* 3. *c.* 146. § 5. *supra*, 291 *c.*

(5) *May* v. *May*, A. D. 1762. 2 *Stra.* 1072. *Bull*, N. P. 112.; and see same principle, *Lee* v. *Meeroch*, 5 *Esp.* C. N. P. 177. *Hughes* v. *Wilson*, 1 *Stark.* C. N. P. 179.

(6) *The King* v. *Bramley*, 6 T. R. 330.

seems here to have been considered) in that case it should not be received as the original authenticated entry.

Copies of the register of a dissenting chapel shall not be pleaded as evidence; but may be produced at the hearing of the cause, and be made evidence to a certain extent. (7)]

Repair of the church. See Church. [295]

Residence.

1. OTHO. The bishop shall provide, that in every church there shall be one resident, who shall take care of the cure of souls, and exercise himself profitably and honestly in performing divine service and administration of the sacraments. *Athon.* 36. [296]

Residence by canon.

The rule of the ancient canon law was, that if a clergyman deserted his church or prebend, without just and necessary cause, and especially without the consent of the diocesan, he should be deprived. And agreeably hereunto was the practice in this realm; for though sometimes the bishop proceeded only to sequestration or other censures of an inferior nature, yet the more frequent punishment was deprivation. *Gibs.* 827.

2. Regularly, personal residence is required of ecclesiastical persons upon their cures; and to that end, by the common law, if he that hath a benefice with cure be chosen to an office of bailiff, or beadle, or the like secular office, he may have the king's writ for his discharge. 2 *Inst.* 625.

Residence by the common law.

For the intendment of the common law is, that a clerk is resident upon his cure: insomuch that in an action of debt brought against J. S. rector of D., the defendant pleading that he was demurrant and conversant at B. in another county, the plea was overruled; for since the defendant denied not that he was rector of the church of D., he shall be deemed by law to be demurrant and conversant there for the cure of souls. 2 *Inst.* 625.

3. By the statute of the *articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 8. In the articles exhibited by the clergy, one is as follows: Also barons of the king's exchequer, claiming by their privilege that they ought to make answer to no complainant out of the same place, do extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries, that by no means or for any cause, so long as they be in the exchequer, or in the king's service, they shall not call them to judgment: Unto which it is answered, It pleaseth our Lord the king, that such clerks as attend in his service, *if they offend*, shall be correct by their ordinaries, like as other; but so long as they are occu-

Residence by statute.

(7) *Newham* v. *Raithby*, 1 *Phill. Rep.* 315.

pied about the exchequer, they shall not be bound to keep residence in their churches: And this is *added of new by the king's council: The king and his ancestors, since time out of mind, have used that clerks which are employed in his service*, during such time as they are in service, shall not be compelled to keep residence at their benefices; and such things as be thought necessary for the king and commonwealth ought not to be said to be prejudicial to the liberty of the church.

If they offend] This extendeth only to offences or crimes whereof the ecclesiastical court hath cognizance, as heresy, adul-
[297] tery, and the like, which the ordinary may correct; and not unto civil actions. 2 *Inst*. 624.

Added of new by the king's council] By this is meant the parliament, or common council of the realm, as it is termed in original writs, and in other legal records, and so it is taken in other acts of parliament, and in the preamble of this act also. 2 *Inst*. 624.

That clerks which are employed in his service] This is general, and not limited (as the former is) to the privilege of the exchequer; but extendeth to any other service for the king and commonwealth; as if he be employed as an ambassador into any foreign nation, or the like service of the king, which is for the public, which ever must be preferred before the private. 2 *Inst*. 624.

The king and his ancestors since time out of mind have used] The clergy in this parliament inveighing vehemently against this answer, and that it tended to the breach of the ecclesiastical liberty, which was granted to them by *magna charta*, and often confirmed by other acts of parliament, that *the church of* England *shall be free*; to this it was answered, that the words subsequent in the *magna charta* explained these words, *and shall have all her whole rights and liberties inviolable*; so as the clergy cannot claim any right but *jus suum*, nor any liberty but *libertates suas* (as the words are): and the point here in question, *viz.* to proceed against a clerk for non-residence, whilst he was in the king's service for the commonwealth, was neither *jus suum*, nor *libertas sua*, but *libertas regis*. And therefore the parliament thought it fit to declare, that the king and his ancestors had used this liberty or prerogative time out of mind: and where it was said, that this tended to the prejudice of the liberty of the church, the parliament thereto answered (which is worthy, lord *Coke* says, to be written in letters of gold), *Such things as be thought necessary for the king and commonwealth, ought not to be said to be prejudicial to the liberty of the church*. 2 Inst. 624.

[298— *It shall be lawful to the king to give license to every of his own*
304] *chaplains, for non-residence* upon their benefices; any thing in this act to the contrary notwithstanding. 21 *H*. 8. *c*. 13. § 29.

Provided also, that every duchess, marquess, countess, baroness, widows, which *shall take any husbands under the degree of a baron*, may take such number of chaplains as they might have

done being widows; and that every such chaplain may have like liberty of non-residence, as they might have had if their said ladies and mistresses had kept themselves widows. § 33.

It shall be lawful to the king to give license to every of his own chaplains for non-residence] In the former part of the act it was expressed, that the several chaplains therein mentioned might be dispensed withal for their non-residence, during such time only as they should be and remain in the household of those who retained them: but this clause seemeth to contain one exception to that limitation, with regard to the chaplains of the king; who may (as it seemeth) by this clause give license to any of his own chaplains for non-residence generally, and not only during the time of their attendance in the household: And this proviso seemeth only to be a saving of the king's right which he had before, as is set forth in the answer to one of the *articuli cleri* before mentioned, and in the comment thereupon. [And see the saving in 57 *G.* 3. *c.* 99. § 80.] [305] [306]

Shall take any husbands under the degree of a baron] If any of these retaineth chaplains, according to this statute, and afterwards taketh to husband one of the nobility (as it was in *Acton*'s case, where the baroness Mounteagle, after such retainer, took to husband the lord Compton); the retainer remaineth in force notwithstanding such marriage, and the chaplains, so long as they tend upon her, shall not be adjudged non-residents within this act. 4 *Co.* 117. (See Pluralities.) [The two following acts are not expressly repealed by 57 *Geo.* 3. *c.* 99. § 1.]

By the 25 *H.* 8. *c.* 16. Whereas by the statute of the 21 *H.* 8. *c.* 13. (§ 28. *now* Repealed *by* 57 *G.* 3. *c.* 99. § 1.) it was ordained, that certain honourable persons, as well spiritual as temporal, shall have chaplains beneficed with cure to serve them in their honourable houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared in the same parliament, for non-residence upon their said benefices; in which act no provision was made for any of the king's judges of his high court, commonly called the king's bench and the common pleas, except only for the chief judge of the king's bench, nor for the chancellor, nor the chief baron of the king's exchequer, nor for any other inferior persons being of the king's most honourable council: It is therefore enacted, That as well every judge of the said high courts, and the chancellor and chief baron of the exchequer, the king's general attorney and general solicitor, for the time that shall be, shall and may retain and have in his house or attendant to his person, one chaplain having one benefice with cure of souls, which may be absent from his said benefice, and not resident upon the same: the said statute made in the said one-and-twentieth year, or any other statute, act, or ordinance to the contrary notwithstanding.

By the 33 *H.* 8. *c.* 28. Whereas by the act of the 21 *H.* 8. [307]

c. 13. [§ 28. *now* Repealed by 57 *G.* 3. *c.* 99. § 1.] it was ordained, that certain honourable persons, and other of the king's counsellors and officers, as well spiritual as temporal, should and might have chaplains beneficed with cure to serve and attend upon them in their houses, which chaplains shall not incur the danger of any penalty or forfeiture made or declared
[308] in the said act for non-residence upon their said benefices; in which act no provision is made for any of the head officers of the king's courts of the duchy of Lancaster, the courts of augmentations of the revenues of the crown, the first fruits and tenths, the master of his majesty's wards and liveries, the general surveyors of his lands, and other his majesty's courts: It is therefore enacted, That the chancellor of the said court of the duchy of Lancaster, the chancellor of the court of augmentations, the chancellor of the court of first fruits and tenths, the master of his majesty's wards and liveries, and every of the king's general surveyors of his lands, the treasurer of his chamber, and the groom of the stole, and every of them, shall and may retain in his house, or attendant unto his person, one chaplain having one benefice with cure of souls, *which may be absent from the said benefice, and non-resident upon the same;* the said statute made in the said twenty-first year of his majesty's reign, or any other statute, act, or ordinance to the contrary notwithstanding. § 1.

Provided always, That every of the said chaplains so being beneficed as aforesaid, and dwelling with any the officers aforenamed, shall repair twice a year at the least to his said benefice and cure, and there abide for eight days at every such time at the least, to visit and instruct his said cure; on pain of 40*s.* for every time so failing, half to the king, and half to him that will sue for the same in any of the king's courts of record, in which suit no essoign, protection, or wager of law shall be allowed. § 2.

By 57 *Geo.* 3. *c.* 99. § 1. so much of the 21 *Hen.* 8. *c.* 13. (8), 28 *H.* 8. *c.* 13., 13 *El.* *c.* 20., 14 *El.* *c.* 11., 18 *El.* *c.* 11., 43 *El.* *c.* 9., 3 *C.* 1. *c.* 4., as relates to *spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices;* and so much of 12 *Ann.* *st.* 2. *c.* 12., and of 36 *Geo.* 3. *c.* 83., as relates to the *maintenance of curates within the church of* England, *and making provision for appointing stipends for such curates;* and the whole of 43 *Geo.* 3. *c.* 84., 43 *Geo.* 3. *c.* 109., and 53 *Geo,* 3. *c.* 149., are from and after the passing of this act, (*viz.* on 10th July, 1817) respectively repealed.

By § 72., in all cases in which the term "*benefice*" is used in this act, it shall mean "benefice *with cure*," and shall comprehend

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(8) The penalty of 10*l.* imposed for non-residence, by 21 *H.* 8. *c.* 13. had been previously repealed by § 12. of 43 *G.* 3. *c.* 84.; which latter act was itself repealed by the above section.

therein all donatives, perpetual curacies, and parochial chapelries. Thus, by § 81. no parsonage having a vicar endowed, see S. P. 21 *H.* 8. *c.* 13. § 31. *ante*, tit. **Pluralitp**,) or a perpetual curate and *without cure* of souls, shall be deemed a *benefice* within this act.

From and after 10th July 1817, every *spiritual person* (9) holding any benefice, who shall without any license or exemption, as by this act allowed, *wilfully absent himself* therefrom (1) for three months together, or to be accounted at several times in *one year* (2), and abide elsewhere than at some other benefice, donative, perpetual curacy, or parochial chapelry of which he may be possessed, shall, when his absence shall exceed such period, and not six months, forfeit one third of the *annual value* (3), deducting thereout all outgoings except curates' salary of the benefice, &c., from which he shall absent himself; and when such absence shall exceed six months, but not eight, he shall forfeit one-half of such value; and when it shall exceed eight months, two-thirds; and when the whole year, three-fourths thereof; to be recovered in his majesty's *courts of record at Westminster or of Great Sessions in Wales* (4), and no essoin, &c. allowed. The whole penalty shall

(9) Evidence that the defendant did several acts as parson, such as receiving tithes, &c. is sufficient without proving his admission, institution, and induction. *Bevan* v. *Williams*, 6 *T. R.* 535. *n.*

(1) The statute 21 *H.* 8. *c.* 13. did not extend to a spiritual person not *wilfully* absent: As, *e. g.* if there were no parsonage-house, (*Butler* v. *Goodale*, 6 *Rep.* 21 *b. Cro. El.* 590. *Mo.* 540. S. C.), or if he be imprisoned without covin, or was removed by advice of physicians, without fraud, for recovery of his health. (S. C. see *Gibs.* 887. 2 *Bulst.* 18. *acc.*) But sequestration of benefice with cure is no excuse for non-residence (*Doe* v. *Mears*, 1 *Cowp.* 129. *Lofft.* 602); and an information without the word "*wilfully*" is therefore bad. *Collins* v. *Vaughan*, *Cro. El.* 100.

(2) In *Cathcart* v. *Hardy*, in error, K. B. 2 *M. & S. Rep.* 534. A similar wording of the 43 *G.* 3. *c.* 84. now repealed, was held to mean *year* "from the time when the action is commenced;" but by § 35. of *this* act a different regulation is introduced. See *infra*, 308 *n.* As to suing for penalty, see *Com. Dig.* tit. *Pleader*, (2 S. 23.); and as to time of absence not covered by licence, but not amounting to three months, see note to § 45. As to several counts, see *Fletcher* v. *Dickenson*, 2 *Bla. Rep.* 906.

(3) The words, "annual value," in 43 *G.* 3. *c.* 84. now repealed by § 1. of the above act, were held to mean, "average annual value." *Cathcart*, clerk, v. *Hardy*, in error, K. B. 2 *M. & S.* 534.

(4) No information on 21 *H.* 8. *c.* 13. lay at the assizes, *Garland* v. *Burton*, *Stra. Rep.* 1103. *Andr.* 291.; for 21 *Jac.* 1. *c.* 17. was never intended to give a new jurisdiction to the assizes, where they had it not before. So in *Leigh* v. *Kent*, 3 *T. R.* 362. B. R. held, after verdict, that an affidavit that the offence was committed in the county where the action was brought, and within a year before bringing it, according to 21 *J.* 1. *c.* 4. was not necessary in an action on 21 *H.* 8.

go to the person who shall inform and sue for the same, with such costs of suit as are allowed according to the practice of the court where the action is brought. § 5. (5)

Every spiritual person having any benefice, and no house of residence thereon, and who has resided nine months of the year within the limits of his benefice, or of the city, town, place or parish in which his benefice is situate, (provided such residence be within two miles from the church or chapel of his benefice,) shall not be liable to any penalties for non-residence, nor obliged to take out any licence in respect thereof, but the same shall be deemed a legal residence, and in all returns made by bishops, persons so residing shall be returned as resident. § 6.

Houses purchased by governors of queen Anne's bounty, though not situate within the parishes for which they are purchased, but approved by the bishop by writing under his hand and seal, and duly registered in the registry of the diocese, shall be deemed houses of residence appertaining to such benefices. § 7.

In cases of rectories having vicarages endowed (see § 81.), the residence of the vicar in the rectory-house shall be deemed a legal residence, provided the vicarage-house be kept in proper repair to satisfaction of the bishop. § 8. Such rectories having vicarages endowed without cure, are not within this act. § 81.

The bishop in every case where there is not a house of residence belonging to any benefice within the diocese, may allow any fit house within or (if so contiguous as to be sufficiently convenient) without the limits of the benefice and belonging thereto, to be the house of residence thereof; and such allowance and adjudication in writing under hand and seal of the bishop shall be registered in the registry of the diocese, and such house shall be thenceforth deemed the house of residence for time being to all intents and purposes. § 9.

By § 10. No spiritual person being chancellor, vice chancellor, or commissary of either university of Oxford or Cambridge, or being warden or other head of any college within such universities, or holding any professorship or public readership within such universities, being actually resident within the precincts of such universities, or actually residing and reading lectures therein; no scholar under thirty years of age abiding for study without

c. 13.; however, the offence must be laid in the proper county. *Bull. N. P.* 196.

(5) This (says Bishop *Gibson*, in his comment on the penalty of 10*l.* imposed for a like offence by 21 *H.* 8. *c.* 13.) is a coercion on incumbents which may be used by any person or persons whatsoever, and does not supersede or affect the right that the ordinary has, by the laws of the church, to punish non-residence by ecclesiastical censures; which, in case of obstinacy on the part of the incumbent, may be carried to deprivation. *Gibs.* 837. and see *s.* 25. 308. *k.*

fraud at either university; no chaplain of the king or queen, or their children, brethren, or sisters, during so long as he shall actually attend in discharge of his duty as such chaplain in the household to which he belongs; *no chaplain of any archbishop or bishop, or temporal lord of parliament*, or other person authorized by law to appoint chaplains (see 21 *H.* 8. *c.* 13. § 14. *&c.* tit. **Pluralitp,**) *for so long as such chaplain, &c. shall abide and dwell, and daily attend in actual performance of his duty as such in the household to which he so belongs* (6); and no chaplain to the house of commons, clerk, or deputy clerk of his majesty's closet, or clerk or deputy clerk of the closet of the heir apparent, or chaplain-general of his majesty's forces by sea or land, or chaplain of his majesty's dock-yards, while actually attending and performing the duties of

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[*Nota.* This note was inserted in the former editions of Burn as applying to the *then existing* statutes of residence: and is here retained as elucidating the *present* enactments on this subject. Ed.]

(6) *No chaplain of any archbishop or bishop, or temporal lords of parliament*] The service of the bishop is allowed by the canon law to be a sufficient license for non-residence: For the necessary care and business of a diocese do require, that the bishop should have the assistance of one or more clergymen. And since it is much easier to find a proper curate to serve a parish, than a proper person to advise and assist the bishop in the general care of the diocese; the law considers the person who abides with the bishop for these purposes as more usefully employed, than if he were confined to the care of one parish only. Bishop *Sherlock*'s charge in the year 1759, *p.* 9. And the statute hath extended this exemption to other cases not expressly mentioned in the canon law; as to the chaplains of the nobility and great officers of the crown; though cases of this kind had usually been dispensed with before the act: which dispensations were founded upon the general power reserved to the bishop by the canon law, to dispense where there appeared to him to be *a just and reasonable cause.* And since the virtue and example of great and potent families must necessarily have a great influence upon the manners and religion of any country; it was thought reasonable to dispense with the personal attendance of an incumbent in his parish whilst he was employed in performing the offices of his function in such families. *Id. p.* 9, 10.

During the time that they shall so abide and dwell without fraud or covin, in any of the said honourable household] The statute considers the service of the chaplain in the household of his lord, as the only ground of the exemption; and it cannot be doubted (Dr. *Sherlock* says) but that service is only meant as is proper and peculiar to the office of such chaplain. And therefore a mere retainer (he says) of a clergyman to be chaplain to a nobleman, unless he actually abides and dwells in the household, is no title to the exemption of the statute; and if one retained and titled chaplain abides in the household to do any *other* service, and not the service of a chaplain, it is not such an abiding as the statute intends, but is fraudulent. *Gibs. p.* 10, 11.

such office respectively; no chaplain of the household of British ambassadors abroad; no chancellor, or vicar-general, or commissary, while performing the duties of their offices; no archdeacon while on visitation or otherwise engaged in his functions; no minor canon, *vicar choral, or priest vicar* (7), or any other such like officer in any cathedral or collegiate church during his actual residence within the precincts thereof, or of the town, &c. where the same is situated or its suburbs, and actually performing the duties of his office; no dean, sub-dean, priest, or reader in his majesty's chapels at St. James's or Whitehall, or reader in his majesty's private chapels at Windsor or elsewhere, while residing and actually performing the duty of any such office respectively; no preacher in any inn of court or at the rolls; no bursar, treasurer, dean, vice-president, sub-dean, or public tutor or chaplain, or other such public officer, in any college or hall in Oxford, or Cambridge, during his official and actual residence to perform the duties of any such office; no public librarian, public registrar, proctor, or public orator, or such like public officer, in either Oxford or Cambridge, during like official and actual residence; no fellow of any college in such universities during the time for which he may be required to reside by charter or statute, and shall actually reside therein; no warden, provost, or fellow of Eton or Winchester colleges, or master of the Charter-house during the time he is required to reside, and shall actually reside therein or within the city, or town, or suburbs of such city, &c. within or near which the colleges are respectively situate, or as a master or usher in the colleges of Eton or Winchester, or of Westminster school, or as principal or professor of the East India college; and no persons specially exempt from residence under any acts of parliament not hereby repealed: shall be liable to any of the penalties of this act for any non-residence during any such period as aforesaid on any benefice; but every such spiritual person with respect to residence under this act shall be entitled to account such period as if he had legally resided on some other benefice. (8)

By § 11. Any dean during residence on his deanry, or being *prebendary* (9) or canon, or holding any other dignity in any cathedral or collegiate church, who shall reside any period not exceeding four months within the year upon such dignity, may account

(7) Superseding 27 *H.* 8. 10. *b.* *Com. Dig.* tit. *Esglise*, (N 4.)

(8) As to rule to discontinue action for penalty for non-residence on notification of exemption, see *Wright* v. *Legge*, 6 *Taunt.* 48.

(9) A prebend was held to be a benefice within 43 *G.* 3. *c.* 84. § 12. *Cathcart* v. *Hardy*, in error, K.B. 2 *M.* & *S. Rep.* 524., and that act required a prebendary to reside on his prebend, although the statutes of his cathedral did not require it. *Hardy* v. *Cathcart*, in C.P. 5 *Taunt. Rep.* 2. See also *Wright* v. *Legge*, 6 *Taunt.* 48. The *Dean of Windsor's* case, under that act.

such residence as a legal residence on some benefice; provided that any spiritual person holding any prebend, canonry, or dignity in any cathedral or collegiate church in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years, at such cathedral, &c. in whole or in part, between the 1st of January and 31st of December in any one year, may account such residence, though exceeding four months in the year, as reckoned from the 1st of January and 31st December in any one year, as if he had legally resided on some benefice.

By § 12. The bishop of the diocese in which any benefice is locally situate may license any longer period of non-residence thereon, of any prebendary, canon, or other person holding any dignity in a cathedral or collegiate church, in any case in which it shall appear to him from his own knowledge (if such cathedral is within his own diocese, or if not, by certificate of the bishop of the diocese where it is locally situate,) to be required for the performance of the duties in any such cathedral or collegiate church; provided that every such person shall during such period reside on such dignity.

By § 13. No person appointed to any prebend, canonry, or dignity before this act passed, *viz.* 10th July, 1817, shall be subject to any penalty for non-residence on any benefice during his actual residence on such dignity.

By § 14. Every spiritual person having any house of residence on his benefice who shall not reside thereon, shall, during period or periods of non-residence, whether for the whole or part of a year, keep the same in good repair; and if he neglect so to do, and on monition from the bishop in whose diocese it is locally situate, shall not put it in repair according to, and within the time therein mentioned, to the satisfaction of the bishop, and to be certified to him upon such survey and report as shall be required by the bishop in that behalf, shall be liable to the penalties of non-residence, notwithstanding exemption or license, during the time such house is out of repair, and until it has been put in good repair to the satisfaction of the bishop. (See *Gibs.* 887.)

By § 15. Any bishop, on application by petition in writing (see § 18.) by any spiritual person, or by any fit person on behalf of any such person having any benefice locally situate within his diocese, upon such proofs as to any facts stated in such petition as such bishop may think necessary, and shall require by affidavit made before any ecclesiastical judge or his surrogate, or any justice of peace, or magistrate, or master extraordinary in chancery, (which oath any such ecclesiastical judge, &c. is hereby respectively required to administer,) may grant in the cases herein enumerated,

grant such license, shall be forthwith transmitted to the archbishop of the province, who shall forthwith by himself, or by some commissioner or commissioners appointed from his bishops, by writing under his hand, (and who are therefore authorized to execute such commission,) examine into the case, and make such enquiries as to any particulars relating thereto, as he may think necessary; and after such enquiries made by himself, or where made by commissioners, after return of the substance thereof in writing to such archbishop, he shall thereupon allow or disallow such license, or alter the same in the whole or in part, as to the period for which the same may have been granted or otherwise, and likewise as to the curate's stipend, as seems fit to him; and no such license shall be good, unless it is allowed by such archbishop, such allowance being signified by his signing the same, and the cause of granting the same need not be stated.

By § 17. The death or removal of the bishop shall not void any licenses by him granted, but the same shall be good, unless revoked by any successor.

By § 18. Every application to the bishop for license for non-residence, shall be in writing, signed by the applicant, and shall state whether the party will perform the duty himself; and if so, where, and at what distance he intends to reside; or if he intends to employ a curate, it shall state the salary to be given him, and whether the curate will reside in the parish; and if so, whether in the parsonage-house; and if he does not intend to reside therein shall state at what distance therefrom, and at what place he will reside, and whether such curate serves any other parish as curate or incumbent, or has any ecclesiastical preferment, or holds any donative, perpetual curacy, or chapelry, or officiates in any other church or chapel, and also the gross annual value of the applicant's benefice; and such license shall not be granted, unless the application contain a statement of the above particulars; and all such applications and specifications shall be filed by the registrar in a separate book, of which no inspection or copies shall be made, except by leave in writing from the bishop.

By § 19. During the vacancy of any see, such licenses may be granted by the vicar-general of the diocese; or in case the bishop cannot exercise in person the functions of his office, the same shall be exercised by the person lawfully empowered to exercise his general jurisdiction in the diocese.

By § 20. Any bishop who has granted any license for non-residence as above, or his successors, may revoke the same if he thinks fit, but the spiritual person may appeal as in § 15. and the archbishop appealed to may order such reasonable fees and charges to be paid by the appellant for any such proceedings as he shall in his discretion think fit; but no license for non-residence shall continue in force above three years from its being granted, or

after 31st December in the second year after that in which it was granted. (4)

By § 21. Every bishop granting or revoking any license for non-residence under this act, shall within one month after cause a copy of every such license or revocation to be filed in the registry of his diocese; and the registrar shall make an alphabetical list to be entered in a book and inspected by all persons, on payment of 3*s.* only; and a copy of every such license with respect to any benefice shall be transmitted by the spiritual person to whom it was granted to the churchwardens of the parish, &c. to which it relates, within one month after grant thereof; and every bishop revoking any license shall cause such revocation to be transmitted to a churchwarden of the parish or place to which it relates, to be deposited in the parish chest; and every registrar neglecting to enter the same shall forfeit for each neglect 5*l.*, to be recovered to the use of the informer in the same way as other penalties hereby imposed may be; and a copy of every such license or revocation shall likewise be produced by the churchwardens, and publicly read at the visitation for the district next succeeding such grant or revocation.

By § 22. Every archbishop who shall in his own diocese grant or allow, or approve as herein directed, any license in cases not enumerated herein, shall annually, before 31st January, transmit to his majesty in council a list of all such licenses so granted, allowed, or so approved, in the year ending on 31st December preceding; and shall specify therein the reasons that induced him to grant or approve the same, with the reasons transmitted to him by the bishops for granting same; and his majesty may by order in council revoke and annul any such license; and if it is so revoked, a copy of any such order shall be sent to the archbishop granting or approving such license, who shall transmit a copy thereof to the bishop of the diocese where the license was granted, who shall file a copy of the mandatory part in the registry of his diocese, and deliver a like copy to the churchwardens of the parish to which it relates, as in § 21.; and if granted by the archbishop, he shall file and deliver such copies in his own diocese; but such license, although so revoked, shall be deemed valid for the period between its grant and revocation.

By § 23. Every bishop, on or before 25th March in every year, shall make a return to his majesty in council of every benefice within his diocese, and the name of the several persons holding the same, specifying those who have and those who have not resided by reason of any exemption under this act; or of any license granted by such bishop for any and what causes enumerated by this act, and also of all persons not having any such

(4) See note to § 45.

exemption or license, who have not resided on their respective benefices, as far as the bishop is informed thereof; and also the names of all curates licensed to serve the benefice of any non-resident incumbent, and whether the gross annual value of any benefice amounts to or exceeds 300*l.* *per annum*, or not; the amount of the curate's salary, and his place of residence; and every spiritual person non-resident by reason of exemption, or resident on another benefice, for which they need not take out any license under this act, shall, within six weeks after 1st January in every following year, notify the same in writing under his hand to the bishop of his diocese, specifying the nature of such exemption, and whether the gross annual value of the benefice on which he is non-resident amounts to or exceeds 300*l.* *per annum* or not; and every spiritual person having more than one benefice, and residing on one of them, or residing during any part of the year on any dignity, or in performance of the duties of any office in any cathedral or collegiate church, or who are non-resident for any period of the year for any of the causes of temporary exemption specified in this act, shall in like manner and within like period in each year notify the same.

By § 24. Persons neglecting to make such notification within the time in the last section shall forfeit 20*l.* for each offence; to be levied by order of the bishop by sequestration (if not paid after monition to pay same) out of the profits of the benefice in respect of which such neglect is incurred; to be applied, according to direction of the bishop, in charity, provided he may remit or order payment of any part of the penalty (in same way as in § 26. allowed) for non-compliance with order for residence.

Nothing in this act shall exempt any spiritual person from ecclesiastical censures for non-residence without license, or affect any proceedings hereafter to be instituted in any ecclesiastical court, in relation to non-residence of any person holding any benefice, who is not licensed for nor has other lawful cause for absence, in order to inflict same; provided no proceedings be admitted in any ecclesiastical court against such spiritual person for such non-residence not exceeding three months in one year, except at instance of the bishop of the diocese where the benefice not resided on is situated. § 25.

If any person holding any benefice and being licensed, or having other lawful cause of absence, does not sufficiently reside on the same, the bishop may issue a monition to him forthwith to reside thereon and perform the duties thereof, and to make a return to such monition within a time therein limited; so as there be thirty days between the time of delivering the same to such person or leaving the same at his then usual or last place of abode, or if not there to be found, then with the officiating minister or one of the churchwardens, and also at the house of

residence (if any) belonging to any such benefice, to which such person is required by such monition to go and reside, and the time specified in such monition for making a return thereto; and a copy of every such monition shall immediately on its issue be filed in the registry of the bishop's court, and shall be open for inspection on payment of 3s.: the person to whom such monition is directed shall make return into such registry within the time specified, there to be filed, and the bishop may require such return to be verified on oath of such person and others, before some surrogate, justice of peace, or master extraordinary in chancery, who shall administer the same on application for that purpose; and in every case where no such return is made, or where it does not state satisfactory reasons for non-residence, or where the same or any of the facts therein shall not be so verified on oath when required, the bishop may issue an order in writing under his hand and seal, requiring such spiritual person to reside as aforesaid within thirty days after such order in writing or delivery of a copy thereof as herein-before required in case of monitions. § 26.

In case of non-compliance with such order, the bishop may sequester the profits of the benefice of such spiritual person till it is complied with, or good reasons stated and proved for non-residence; and may by order under his hand, filed as above, apply such profits, after deducting the expences of serving the cure, in such way as he deems fit: in the first place, to pay the expences of such monition and sequestration; in the next, towards augmentation and improvement of any such benefice, or the house of residence, buildings, appurtenances, or glebe thereof; and may direct the same or part thereof to be paid to the governors of queen Anne's bounty, for augmentation of the maintenance of poor clergy, to be applied for the purposes of such augmentation as such bishop shall, under all circumstances, think fit; and any such bishop, within six months after such order for sequestration, or after any money actually levied, may remit to such spiritual person any part of such sequestered profits, or cause any part thereof that has been paid to such governors of queen Anne's bounty, to be repaid by him by order under the hand of such bishop, out of any money then or next coming into their hands, in any case where by reason of subsequent obedience to monition or order, or after stating and proving sufficient reasons as above, such bishop shall think the same proper; provided such spiritual person may within one month after order made appeal against such sequestration to the archbishop of the province, who by himself or his commissioner or commissioners appointed from among his bishops, under his hand and seal, shall forthwith enquire into same, and make such order therein relating thereto, or to the profits so sequestered for

the return of the same, or any part thereof, or otherwise, as under all circumstances he shall deem fit after such enquiry made by himself or the substance thereof returned in writing to him by such commissioner, &c., provided such appellant shall give security to bishop for payment of such reasonable expences of appeal as the archbishop or his commissioners, &c. shall award; and provided that no order for sequestration shall be put in force pending such appeal. § 26.

By § 27. Every person who shall forthwith return to residence, in obedience to monition, and the profits of whose benefice are not sequestered, shall nevertheless pay all costs attending the same; to be levied in the same way as any costs may be levied on any spiritual person under this act.

If any person not licensed under this act to be absent from his benefice, or not having lawful cause of absence therefrom, shall, in obedience to any such monition or order, and before or after sequestration, have begun to reside on his benefice, and shall within six months after such commencement to reside, without leave of the bishop, begin to absent himself, such bishop may again sequester and apply the profits of his benefice as in § 26. without issuing any other monition or order, and may so proceed in like cases from time to time as occasion requires, provided that such party may again appeal against such sequestration in like manner as before directed; but such sequestration shall nevertheless be in force during such appeal. § 28.

Where any spiritual person has become subject to any penalty for non-residence, the bishop of the diocese within which the same has arisen may proceed against him for such past non-residence, and levy the penalties incurred thereby by monition and sequestration; and may direct application thereof in like manner, and with like regulations and powers of remitting or ordering repayment of any part of such penalties, as directed in cases of non-compliance with any order of residence. § 29.

Where any archbishop or bishop has proceeded by monition to recover the penalties of more than one third the value of such benefice for any non-residence exceeding six months in the year, and has remitted the same in whole or in part, such archbishop, &c. shall forthwith transmit to his majesty in council, and such bishop to the archbishop of his province, a list of such cases as have occurred in his or their respective dioceses, specifying the nature and special circumstances of each case, and reasons for the remission, as in § 16.; and his majesty, or the archbishop, as the case is, may allow or disallow such remission in the whole or in part, in the same way as licenses for non-residence. (See § 15.) Provided always, that the archbishop's decision in cases transmitted to him from any bishop is final. § 30.

If the benefice of any spiritual person shall continue for two years under any sequestration made under this act for disobedience to the bishop's monition requiring him to reside on his benefice, or shall incur under this act three such sequestrations in two years, (such spiritual person not being relieved therefrom on appeal,) the benefice not resided on shall be void; and the bishop shall give notice thereof to the patron, who may present any other than the same spiritual person. § 31.

By § 32. All contracts for letting the house of residence, or buildings, gardens, orchards, and appurtenances necessary to the convenient occupation of the same, belonging to any benefice, to which house any spiritual person is required, by order of the bishop, to proceed and reside therein, or which is assigned as a residence to any curate by the bishop, shall, on serving a copy of such order or assignment on the occupier thereof, or left at the house, be null and void; and a copy of such order, &c. shall, immediately on its issue, be transmitted to one of the churchwardens or such other person as the bishop thinks fit, and by him forthwith served on such occupier, or left at the house; and any person continuing to hold the same after the day appointed by such order for the residence therein of such spiritual person, or which shall be specified in any such assignment, and after service or leaving such copy as above, shall forfeit 40*s.* for every day which he shall, without permission of the bishop in writing, wilfully continue to hold the same, together with the expence of serving such order, if specially served, to be allowed by the bishop, and recovered and applied as the non-residence penalties are directed to be recovered and applied under this act; and the spiritual person so directed to reside, or curate to whom such residence is assigned, may apply to any justice or magistrate for a warrant for taking possession thereof, who, on production of the order for such possession, shall thereupon give a warrant for the same; and possession may thereupon be taken, at any time in the day-time, by entering it by force if necessary, without other proceeding by ejectment or otherwise.

No spiritual person is liable to any penalties for non-residence during the time such tenant shall occupy such house of residence, and building, &c. § 33.

After passing this act (*viz.* 10th July, 1817,) no oath shall be required to be taken by any vicar in relation to residence on his vicarage § 34.

By § 35. No penalty shall be recovered against any spiritual person under this act other than such as were incurred within a year ending on the 31st of December immediately preceding the commencement of any proceeding or action for recovery thereof.

By § 36. Every penalty for non-residence under this act,

in respect of which no proceeding shall have been had by monition before the 1st of April next after the year in which the same shall have been incurred, may be recovered by action or suit in the manner by this act directed.

By § 37. No action of debt for recovery of penalties under this act shall be commenced or filed in his majesty's courts of record at Westminster, or great sessions in Wales, until the 1st of May after the expiration of the year in which the offence took place.

For the purposes of this act the year shall commence on the 1st of January and conclude on the 31st of December, both inclusive. § 38. And the months herein named shall be deemed calendar months, except in any case where a month is to be made up of different periods less than a month; in every which case thirty days shall be a month. § 39.

By § 40. No writ shall be sued out, nor copy of any process served, at suit of any informer, on any spiritual persons for any penalty incurred under this act, till a notice in writing of such intended writ or process shall have been left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving it at the registry, by the attorney or agent of the party intending to sue the same out, one calendar month before suing out or serving the same; in which notice shall be clearly expressed the cause of action and the penalty to be sued for, and indorsed with the name and abode of the attorney; and no such notice shall be given before the 1st of April, in the year next after any penalties have been incurred.

No plaintiff shall recover in such action without proof made that such notices were given; and in default thereof, defendant shall have a verdict with double costs. § 41. And no evidence shall be permitted to be given by plaintiff at trial of any such action, of any cause of action, except that contained in his notice. § 42.

Any spiritual person sued for such penalties may, with leave of the court, at any time before issue joined, pay into court such sum as he shall see fit; whereupon proceedings thereon shall be had as in other actions where defendant is allowed to pay money into court. § 43.

By § 44. The court where such action is pending for recovery of any penalty for non-residence under this act, shall on application made for that purpose, require by rule or order of the court, or of any judge thereof, the bishop of the diocese within which the benefice is locally situate, or to whom the same is subject, according to this act, to certify in writing under his hand, to such court, and also to the party named for that purpose in such rule or order, the reputed annual value of such benefice; and upon such rule or order being left with such bishop or his registrar, he shall certify accordingly; and such certificate, in all subse-

quent proceedings on such action or information, shall be received as evidence of the annual value of the benefice, for the purposes of this act, but without prejudice to the admissibility or effect of other evidence respecting the real value thereof.

By § 45. A license for non-residence, and other licenses granted under this act, may be pleaded in bar of any action for penalties under this act; and if after such plea pleaded, plaintiff discontinues, defendant shall have double costs, with usual remedy to recover same; and the court or a judge thereof may, on application, order that plaintiff shall give security for payment of such costs, and that proceedings shall be staid till such security is given as the court, &c. think fit. (5)

Provided that if at the time of filing any monition requiring any spiritual person to reside on his benefice, or to recover the penalties for past non-residence, no notice of action for any penalty shall have been already given as above, then no such action or information shall afterwards be brought for any penalty incurred before monition issued, or during proceedings had under it; and if any such action, &c. is so brought, defendant may plead in bar a monition issued for the same benefice; and unless on application to court the same is dispensed with, shall on pleading such matter file an affidavit, stating the period specified in such monition, and that he believes the bishop is proceeding thereon to make it effectual, otherwise the plea shall be bad. § 46.

No penalty or costs incurred by any spiritual person for non-residence shall be levied by execution on the body whilst they hold the same or another benefice, out of the profits of which it can be levied by sequestration within three years; and in case the body is so taken, the court or judge thereof shall, on application made, discharge the party, if it appears to his satisfaction that the penalty and costs can be so levied. § 47. As to *Residence on Peculiars*, see **Peculiars.**

General provisions of 57 *G.* 3. *c.* 99. In all cases where proceedings under this act are directed by monition and sequestration, such monition shall issue under the hand and seal of the bishop; and being duly served, shall be returned with a certificate of service into the registry of his consistorial court; whereupon the party monished may show cause by affidavit or otherwise, against the sequestration issuing, and unless good cause is shown to the contrary, sequestration shall issue under seal of such consistorial court in the usual form. § 75.

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(5) Though a license for non-residence granted under 54 *G.* 3. *c.* 54. (now Exp.) did not cover the whole of the period for which penalties were sought to be recovered, yet if there be not sufficient time left uncovered to subject the incumbent to a penalty, the court of C. P. will interfere to stay the proceedings. *Wynn* v. *Kay*, 1 *Marsh*, 387. 5 *Taunt*. 843. S. C. and see 308 *a*. note (8).

By § 76. The bishop of any diocese in which any spiritual person shall hold any dignity or benefice, or serve as stipendiary curate, may recover any penalty incurred under this act in a summary way, by monition and sequestration issued as in § 26., with like powers of remission and repayment as in case of penalties for non-residence; provided the party against whom such proceedings are had by the bishop, shall not be subject to any action at law, by any informer or other person, for recovery of any penalty for the same offence for which such proceeding has been so had by the bishop.

Any fees or costs incurred or directed to be paid by any spiritual person under this act, and remaining unpaid for twenty-one days after demand in writing, left at the usual or last place of abode of the spiritual person liable to payment thereof, may be recovered by monition and sequestration to be issued as by this act directed. § 77.

No commission issued by any bishop to any commissary to administer the oaths required to be taken by any curate, for the purpose of any license granted under this act, shall be subject to stamp duty. § 79.

Nothing herein shall affect his majesty's present prerogative in granting dispensations for non-residence on benefices. § 80.

No parsonage that hath a vicar endowed, or a perpetual curate, and without cure of souls, shall be deemed a benefice within this act. § 81.

No archbishop or bishop having any benefice shall be liable to penalties for non-residence thereon, provided that if he hold any benefice *in commendam* with his archbishopric or bishopric, he shall appoint a resident curate under this act. § 82.

This act shall not affect any right, powers, or authority already vested in any archbishop or bishop under any statute, canon, usage, or otherwise howsoever. § 83. Or any act or other law for due celebration of divine service in any church or chapel, or for discharge of any other duty of any rector, vicar, or person holding any benefice by himself or his curate. § 84. This act shall not extend to Ireland. § 85.]

Hospitality to be kept by non-residents.

4. *Peccham.* We do decree, that rectors *who do not make personal residence* in their churches, *and who have no vicars,* shall exhibit the grace of hospitality by their stewards according to the ability of the church; so that at least the extreme necessity of the poor parishioners be relieved; *and they who come there, and in their passage preach the word of God,* may receive necessary sustenance, that the churches be not justly forsaken of the preachers through the violence of want; for the workman is worthy of his meat, and no man is obliged to warfare at his own cost.

Who do not make personal residence] That is, although they be licensed to non-residence by their bishops or others to whom it appertaineth. For if they be non-resident without license,

they are not only bound to the observance of this constitution, but otherwise may be proceeded against according to law. *Lind.* 132.

And who have no vicars] This intimates, that they who have vicars in their benefices are excused from personal residence: And this may be well admitted, where the parish church is annexed to a prebend or dignity; for then the principal is excused by the vicar from personal residence; and the reason is, because he is bound to reside in his greater benefice. But this reason (said *Lindwood*) doth not hold, where in a church there is a rector and vicar, which church doth not depend on any other church; wherefore he who hath such church is not excused from residence by the vicar which he hath there: Nor doth it make against this, if it be alleged, that such rector hath not the cure of souls, but the vicar; for habitually, and in propriety, the cure of souls is in the principal rector; and in the vicar only, as to the exercise and effect thereof. *Lind.* 132.

Who come there, and in their passage preach the word of God] This constitution was made by *Peccham*, in favour of his own brethren the friars, who travelled under the pretence of preaching. *Lindwood* here bears hard upon them, for sauntering up and down in the parishes where they preached, and begging the people's alms after they had received what was sufficient at the parsonage-house. *Johns.* Pecch. *Lind.* 133.

Preach the word of God] That is, if they be licensed and lawfully sent to preach. *Lind.* 133.

[5. By 57 *G.* 3. *c.*99. § 1. so much of 13 *El.* *c.*20. and 14 *El.* *c.*11. as related to leases of benefices and livings, was repealed. See 13 *El.* *c.*20. Leases.] **Leases of non-residents.**

And here the question comes to be considered, How far these statutes, [21 *H.* 8. *c.*13. 25 *H.* 8. *c.*16. 28 *H.* 8. *c.*12. and 33 *H.* 8. *c.*28.] taken together, do supersede the canon law, so as to take away the power which the ordinary had before, of injoining residence to the clergy of his diocese on pain of ecclesiastical censures; and in case of obstinacy on the part of the incumbent, of proceeding to deprivation. (6) It seems to be clear, that before these statutes, the bishops of this realm had and exercised a power of calling their clergy to residence; but more frequently, they did not exert this power, which so far forth was to the clergy a virtual dispensation for non-residence. But this not exerting of their power was in them not always voluntary; for they were under the controlling influence of the pope, who granted dispensations of non-residence to as many as would purchase them, and disposed of abundance of ecclesiastical preferments to foreigners who never resided here at all. The king also, as appears, had a power to require the service of clergymen; and consequently **Residence how may be enforced by canon law.**

(6) *Gibs.* 887. See Deprivation, *note.*

in such case to dispense with them for non-residence upon their benefices. This power of the king is reserved to him by the aforesaid act of the 21. *H.* 8. *c.* 13. [§ 29.] But it is the power of dispensation in the two former cases which is intended to be
[309] taken away, namely, by the bishop, and by the pope; and by the said act residence is injoined to the clergy under the penalty therein mentioned, notwithstanding any dispensation to the contrary from the court of Rome or elsewhere; with a proviso nevertheless, that the said act shall not extend nor be prejudicial to the chaplains and others therein specially excepted. It is argued, that this act being made to rectify what had been insufficient or ineffectual in the canon law, and inflicting a temporal penalty to inforce the obligation of residence, the parliament intended that the said act should be from thenceforth, if not the sole, yet the principal rule of proceeding in this particular; and consequently, that the persons excepted in the act need no other exemption than what is given to them by the act of their non-residence. Unto this it is answered, that the intention of the act was not to take away any power which the bishop had of injoining residence, but the contrary; namely, it was to take away that power which the bishop or pope exercised of granting dispensations for non-residence; that is to say, the act left to them that power which was beneficial, and only took from them that which tended to the detriment of the church; and consequently, that the bishop may injoin residence to the clergy as he might before, only he may not dispense with them as he did before for non-residence. And indeed, from any thing that appears upon the face of the act, the contrary supposition seemeth to bear somewhat hard against the rule which hath generally been adhered to in the construction of acts of parliament, that an act of parliament in the affirmative doth not take away the ecclesiastical jurisdiction, and that the same shall not be taken away in any act of parliament but by express words. It is therefore further urged, that the three subsequent acts do explain this act, and by the express words thereof do establish the foregoing interpretation. In the first of the three it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice, and not resident upon the same;* in the second, it is said, that persons above forty years of age residing in the universities *shall not be excused of their non-residence,* and again that persons *under* forty years of age *shall not enjoy the privilege of non-residence contained in the proviso of the said former act,* unless they perform the common exercises there, and the like, which implies, that if they do this, they shall enjoy such privilege: and in the third, it is said, that the persons therein mentioned may retain one chaplain *which may be absent from his benefice, and non-resident upon the same;* and it is not to be supposed, that the parliament

intended a greater privilege to the chaplains of the inferior officers mentioned in the said last act, than to the chaplains of the royal family and principal nobility mentioned in the first act. Unto this the most apposite answer seemeth to be, that it is not expressed absolutely in any of the said three acts, that the chaplains or others therein mentioned shall enjoy the privilege of non-residence, or may be absent from their benefices, and not resident upon the same; but only this, that they may be absent or non-resident as aforesaid, *the said statute made in the said twenty-first year, or any other statute or ordinance to the contrary notwithstanding.* So that they are only exempted thereby from the restraints introduced by the statute law; but in other respects are left as they were before. — But concerning this, although it is a case likely enough to happen every day, there hath been no adjudication.

Bishops were not punishable by the statute of the 21 *H.* 8. for non-residence upon their bishoprics [unless they were also arch- deacons, deans, or other inferior dignitaries not excepted by that statute by *commendam*; in which case they were, as such, punishable by that statute for non-residence (7)]: but although an archbishop or bishop be not tied to be resident upon his bishopric by the statutes; yet they are thereto obliged by the ecclesiastical law, and may be compelled to keep residence by ecclesiastical censures. *Wats. c.* 37. [*Com. Dig.* tit. *Esglise*, (N 4.)] **Residence of bishops.** [313]

This, by a constitution of archbishop Langton: Bishops shall be careful to reside in their cathedrals, on some of the greater feasts, and at least in some part of Lent, as they shall see to be expedient for the welfare of their souls. *Lind.* 130. [See tit. Bishops, III.] [314]

And by a constitution of Otho: What is incumbent upon the venerable fathers the archbishops and bishops by their office to be done, their name of dignity, which is that of bishop (*episcopus*) or superintendant, evidently expresseth. For it properly concerns them (according to the gospel expression) to watch over their flock by night. And since they ought to be a pattern by which they who are subject to them ought to reform themselves, which cannot be done unless they show them an example: we exhort them in the Lord, and admonish them, that residing at their cathedral churches, they celebrate proper masses on the principal feast days, and in Lent, and in Advent. And they shall go about their dioceses at proper seasons, correcting and reforming the churches, consecrating, and sowing the word of life in the Lord's field. For the better performance of all which, they shall twice in the year, to wit, in Advent and in Lent, cause

(7) *Gibs.* 886. The stat. 57 *G.* 3. *c.* 99. imposes no new obligation of residence on them as bishops; and by § 82. excuses them from the penalties of non-residence on any benefices held *in commendam*, on their appointing a resident curate under that act.

to be read unto them the profession which they made at their consecration. *Athon.* 55.

And by a constitution of Othobon: Although bishops know themselves bound as well by divine as ecclesiastical precepts to personal residence with the flock of God committed to them; yet because there are some who do not seem to attend hereunto, therefore we, pursuing the monition of Otho the legate, do earnestly exhort them in the Lord, and admonish them in virtue of their holy obedience, and under attestation of the divine judgments, that out of care to their flock, and for the solace of the churches espoused to them, they be duly present, especially on solemn days in Lent and in Advent; unless their absence on such days shall be required for just cause by their superiors. *Athon.* 118.

Of deans. 7. *Can.* 42. Every, dean, master, or warden, or chief governor of any cathedral or collegiate church, shall be resident in the same fourscore and ten days *conjunctim* or *divisim* in every year at the least, and then shall continue there in preaching the word of God, and keeping good hospitality; except he shall be otherwise let with weighty and urgent causes *to be approved by the bishop* of the diocese, or in any other lawful sort dispensed with.

To be approved by the bishop] By the ancient canon law, personal attendance on the bishop, or study in the university, was a just cause of non-residence; and as such, notwithstanding the non-residence, intitled them to all profits, except *quotidians. Gibs.* 172.

[315] Of prebendaries and canons. 8. *Can.* 44. No prebendaries nor canons in cathedral or collegiate churches having one or more benefices with cure (and not being residentiaries in the same cathedral or collegiate churches), shall, under colour of their said prebends, absent themselves from their benefices with cure above the space of one month in the year, unless it be for some urgent cause, and certain time to be allowed by the bishop of the diocese. And such of the said canons and prebendaries, as by the ordinances of the cathedral or collegiate churches do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year, concerning residence to be kept in the said churches, as that some of them always shall be personally resident there; and all those who be, or shall be residentiaries in any cathedral or collegiate church, shall, after the days of their residency appointed by their local statutes or custom expired, presently repair to their benefices, or some one of them, or to some other charge where the law requireth their presence, there to discharge their duties according to the laws in that case provided. And the bishop of the diocese shall see the same to be duly performed and put in execution.

So that besides the general laws directing the residence of

other clergymen, these dignitaries have another law peculiar to themselves, namely, the local statutes of their respective foundations, the validity of which local statutes this canon supposeth and affirmeth. And with respect to the new foundations in particular, the act of parliament of the 6 *An. c.* 21. enacteth, that their local statutes shall be in force, so far as they are not contrary to the constitution of the church of England, or the laws of the land. This canon is undoubtedly a part of the constitution of the church: So that if the canon interfereth in any respect with the said local statutes, the canon is to be preferred, and the local statutes to be in force only so far forth as they are modified and regulated by the canon.

9. There doth not appear to be any difference, either by the ecclesiastical or temporal laws of this kingdom, between the case of a rector and of a vicar concerning residence; except only that the vicar [was before 57 *G.* 3. *c.* 99. § 34.] sworn to reside (with a proviso, unless he shall be otherwise dispensed withal by his diocesan), and the rector is not sworn. And the reason of this difference was this: In the council of Lateran held under Alexander the third, and in another Lateran council held under Innocent the third, there were very strict canons made against pluralities; by the first of these councils pluralities are restrained; and every person admitted *ad ecclesiam, vel ecclesiasticum ministerium*, is [316] bound to reside there, and personally serve the cure; by the second of these councils, if any person, having one benefice with cure of souls, accepts of a second, his first is declared void *ipso jure*. These canons were received in England, and are still part of our ecclesiastical law.

Of rectors and vicars.

At the first appearance of these canons, there was no doubt made but they obliged all *rectors;* for they, according to the language of the law, had churches *in title*, and had *beneficium ecclesiasticum:* and of such the canons spoke. But *vicars* did not then look upon themselves to be bound by these canons, for they, as the gloss upon the decretals speaks, had not *ecclesiam quoad titulum:* and the text of the law describes them not as *having benefices*, but as bound *personis et ecclesiis deservire*, that is, as assistant to the rector in his church.

Upon this notion a practice was founded, and prevailed in England, which eluded the canons made against pluralities. A man beneficed in one church could not accept another without avoiding the first; but a man possessed of a benefice could accept a vicarage under the rector in another church, for that was no benefice in law, and therefore not within the letter of the canon, which forbids any man holding two benefices.

The way then of taking a second living in fraud of the canon was this: A friend was presented, who took the institution, and had the church *quoad titulum;* as soon as he was possessed, he

constituted the person vicar for whose benefit he took the living, and by consent of the diocesan allotted the whole profit of the living for the vicar's portion, except a small matter reserved to himself.

This vicar went and resided upon his first living, for the canon reached him where he had the *benefice*; but having no benefice where he had only a vicarage, he thought himself secure against the said canons requiring residence.

This piece of management gave occasion to several papal decrees, and to the following constitution of archbishop *Langton*: viz. No ordinary shall admit any one to a vicarage, who will not personally officiate there. *Lind.* 64.

And to another constitution of the same archbishop, by which it is injoined, that *vicars who will be non-resident shall be deprived. Lind.* 131.

But the abuse still continued, and therefore *Otho*, in his legatine
[317] constitutions, applied a stronger remedy, ordaining that none shall be admitted to a vicarage, but who renouncing all other benefices (if he hath any) with cure of souls, shall swear that he will make residence there, and shall constantly so reside; otherwise his institution shall be null, and the vicarage shall be given to another. *Athon.* 24.

And it is upon the authority of this constitution that the oath of residence is administered to vicars to this day. And this obligation of vicars to residence was further inforced by a constitution of *Othobon*, as followeth; If any shall detain a vicarage contrary to the aforesaid constitution of *Otho*, he shall not appropriate to himself the profits thereof, but shall restore the same; one moiety whereof shall be applied to the use of that church, and the other moiety shall be distributed half to the poor of the parish and half to the archdeacon. And the archdeacon shall make diligent enquiry every year, and cause this constitution to be strictly observed. And if he shall find that any one detaineth a vicarage contrary to the premises, he shall forthwith notify to the ordinary that such vicarage is vacant, who shall do what to him belongeth in the premises; and if the ordinary shall delay to institute another into such vicarage, he shall be suspended from collation, institution, or presentation to any benefices until he shall comply. And if any one shall strive to detain a vicarage contrary to the premises, and persist in his obstinacy for a month; he shall, besides the penalties aforesaid, be *ipso facto* deprived of his other benefices (if he have any); and shall be disabled for ever to hold such vicarage which he hath so vexatiously detained, and from obtaining any other benefice for three years. And if the archdeacon shall be remiss in the premises, he shall be deprived of the share of the aforesaid penalty assigned to him, and be sus-

pended from the entrance of the church, until he shall perform his duty. *Athon.* 95.

So that upon the whole, the doubt was not, whether rectors were obliged to residence; the only question was whether vicars were also obliged: and to inforce the residence of vicars in like manner as of rectors, the aforesaid constitutions were ordained. *Sherl.* ibid. page 20, 21, 22.

[By the 57 *Geo.* 3. *c.* 99. § 34. No oath shall be required of or taken by any vicar in relation to residence on his vicarage. By § 81. the parsonage that *has a vicar endowed*, or a perpetual curate, and *without* cure of souls, shall be deemed a benefice within this act. But the word "benefice" in the act means "benefice with cure," and comprehends therein all donatives, perpetual curacies, and parochial chapelries. § 72.]

Of curates.

10. *Can.* 47. Every beneficed man licensed by the laws of this realm, upon urgent occasions of other service, not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed in the benefice where he doth not reside, except he preach himself at both of them usually.

And by the last article of archbishop *Wake*'s directions (which are inserted at large under the title *Ordination*), it is required, that the bishop shall take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident cure: and where that cannot be done, that they do at least reside so near to the place, that they may conveniently perform all their duties both in the church and parish. [318]

Of pluralists.

11. By the faculty of dispensation, a pluralist is required, in that benefice from which he shall happen to be most absent, to preach thirteen sermons every year; and to exercise hospitality for two months yearly, and for that time, according to the fruits and profits thereof, as much as in him lieth, to support and relieve the inhabitants of that parish, especially the poor and needy.

Of persons presented by the universities to popish livings.

12. By the 1 *W.* *c.* 26. If any person presented or nominated by either of the universities to a popish benefice with cure, shall be absent from the same above the space of sixty days in any one year; in such case the said benefice shall become void. § 6.

Resignation.

FOR general bonds of resignation, see the title **Simony**.

Resignation, what. 1. A resignation (*t*) is, where a parson, vicar, or other beneficed clergyman voluntarily gives up and surrenders his charge and preferment to those from whom he received the same. *Deg. p.* 1, *c.* 14. (8)

To whom to be made. 2. That ordinary who hath the power of institution, hath power also to accept of a resignation made of the same church to which he may institute; and therefore the respective bishop, or other person who either by patent under him or by privilege or prescription hath the power of institution, are the proper persons to whom a resignation ought to be made. (*u*) And yet a resignation of a deanry in the king's gift may be made to the king; as of the deanry of Wells. And some hold, that the resignation may well be made to the king, of a prebend that is no donative: But others on the contrary have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king, as supreme ordinary; because the king is not bound to give notice to the patron (as the ordinary is) of the resignation; nor can the king make a collation by himself without presenting to the bishop, notwithstanding his supremacy. 2 *Roll. Abr.* 358. *Wats. c.* 4.

And resignation can only be made to a superior: This is a maxim in the temporal law, and is applied by lord *Coke* to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter (*w*), but it must be to the metropolitan, from whom he received confirmation and consecration. *Gibs.* 822.

And it must be made to the next immediate superior, and not to the mediate; as of a church presentative to the bishop, and not to the metropolitan. 2 *Roll. Abr.* 358.

But donatives are not resignable to the ordinary; but to the patron, who hath power to admit. *Gibs.* 822.

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole. *Deg. p.* 1. *c.* 14.

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Whether it must be 3. Regularly, resignation must be made in person, and not by proxy. There is indeed a writ in the register, intitled, *litera*

(*t*) The word *Resignation* is not good. *Wats. c.* 4. *Dyer's Rep.* 294, (*a*) *n.* 6. But there is a note there, that the judges held the contrary.

(8) This being his own act, he is not entitled to emblements. *Bulwer* v. *Bulwer*, 2 *Bar. & Ald. Rep.* 471.

(*u*) *Ad eum fieri debet renunciatio ad quem spectat confirmatio. Inst. J. C.* 1. 19.

(*w*) 1 *Roll. Rep.* 137.

procuratoria ad resignandum, by which the person constituted proctor was enabled to do all things necessary to be done in order to an exchange; and of these things, resignation was one. And *Lindwood* supposeth that any resignation may be made by proctor. (*x*) But, in practice, there is no way (as it seemeth) of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a public notary, by an instrument directed immediately to the ordinary and attested by the said notary; in order to be presented to the ordinary, by such proper hand as may pray his acceptance. In which case the person presenting the instrument to the ordinary doth not resign *nomine procuratorio*, as proctors do; but only presents the resignation of the person already made. *Gibs.* 822. *Deg. p.* 1. *c.* 14. *Wats. c.* 4. (*y*)

made in person.

4. A collateral condition [*e. g.* to present any one] may not be annexed to the resignation; no more than an ordinary may admit upon condition, or a judgment be confessed upon condition, which are judicial acts. *Wats. c.* 4.

Must be absolute, and not conditional.

For the words of resignation have always been *purè*, *spontè*, *absolutè et simpliciter*; to exclude all indirect bargains, not only for money, but for other considerations. And therefore in *Gayton*'s case, *E.* 24 *Eliz.* where the resignation was, to the use of two persons therein named, and further limited with this condition, that if one of the two was not admitted to the benefice resigned, within six months, the resignation should be void and of none effect; such resignation, by reason of the condition, was declared to be absolutely void. *God.* 277. *Gibs.* 821. 1 *Still.* 334.

But where the resignation is made for the sake of exchange only, there it admits of this condition, viz. if the exchange shall take full effect, and not otherwise: as appears by the form of resignation which is in the register. *Gibs.* 821. (*z*)

(*x*) And herewith the canon law agrees. *Inst. J. C.* 1. 9.

(*y*) *Heyes* v. *Exeter College, Oxford.* In this case the defendant Vye, by an instrument in the usual form, attested by a notary public, and directed to the bishop of Exeter, expressed his resignation of the vicarage of Merthoe in the county of Devon, and two other notaries public were constituted by him as his proctors to exhibit the same to the bishop. The instrument was sent by the post to the bishop, who merely endorsed it, and signed a memorandum of his acceptance of the resignation. [This is not a public and judicial, but a domestic act, requiring no registration, and satisfies the qualification in the grant of a living that the person to be presented should not at such time as the church should be void "be presented, instituted, or inducted into any other living."] 12 *Ves.* 336.

(*z*) If two parsons obtain licence from the ordinary to exchange their benefices, the exchange must be fully executed by both parties

By a constitution of *Othobon*: Whereas sometimes a man resigneth his benefices that he may obtain a vacant see; and bargaineth with the collator, that if he be not elected to the bishoprick, he shall have his benefices again; we do decree, that they shall not be restored to him, but shall be conferred upon others as lawfully void. And if they be restored to him, the same shall be of no effect; and he who shall so restore him, after they have been resigned into his hands, or shall institute the resigner into them again, if he is a bishop he shall be suspended from the use of his dalmatic and pontificals, and if he is an inferior prelate he shall be suspended from his office, until he shall think fit to revoke the same. *Athon.* 134.

Must be accepted by the proper ordinary.

5. No resignation can be valid, till accepted by the proper ordinary: That is, no person appointed to a cure of souls, can quit that cure, or discharge himself of it, but upon good motives, to be approved by the superior who committed it to him; for it may be, he would quit it for money, or to live idly, or the like. And this is the law temporal, as well as spiritual; as appears by that plain resolution which hath been given, that all presentations made to benefices resigned, before such acceptance are void. (9) And there is no pretence to say, that the ordinary is obliged to accept; since the law hath appointed no known remedy, if he will not accept any more than he will not ordain. *Gibs.* 822. 1 *Still.* 334. (1)

Lindwood makes a distinction in this case, between a cure of souls, and a sine-cure. The resignation of a sine-cure, he thinks, is good immediately, without the superior's consent; because

during their lives, otherwise all proceedings are void. See *Reg. f.* 306. *B.* 2 *Rep.* 74. *b.* *Hob.* 152. 3 *Wils.* 495. [and *tit.* Glebe Lands.]

(9) Thus a presentation by the king before such acceptance was held void. *Fane* v. —, *Cro. Car.* 197.

(1) Though it seems clear that the bishop may refuse to accept resignation, on sufficient cause for refusal, it is undecided, 1. Whether he can at pleasure and without cause refuse to accept any resignation: 2. Who shall finally judge of the sufficiency of the cause: and, 3. By what mode he may be compelled to accept. In the case of the *Bishop of London* v. *Ffytche*, a question was proposed to the judges, Whether the ordinary is bound to accept a resignation. To which most of them answered, that this being an entirely new case, and not made a question of in the courts below, or ever argued at the bar of the Lords, they begged leave for the present to decline answering it. One, however, thought he was compellable by mandamus, if he did not show sufficient cause: Lord Thurlow seemed to be of opinion he could not be compelled, particularly by mandamus, from which there is no appeal or writ of error. Another judge observed, that if he could not be compelled, he might prevent any incumbent from accepting an Irish bishopric, as no one can take that till he has resigned all his benefices in England.

none but he that resigneth hath interest in that case; but where there is a cure of souls it is otherwise, because not he only hath interest, but others also unto whom he is bound to preach the word of God; wherefore in this case it is necessary, that there be the ratification of the bishop, or of such other person as hath power by right or custom to admit such resignation. *Gibs.* 823.

Thus in the case of the marchioness of *Rockingham* and *Griffith*, Mar. 22, 1755. (*a*) Dr. Griffith being possessed of the two rectories of Leythley and Thurnsco, in order that he might be capacitated to accept another living which became vacant, to wit, the rectory of Handsworth, executed an instrument of resignation of the rectory of Leythley aforesaid, before a notary public, which was tendered to and left with the archbishop of York, the ordinary of the place within which Leythley is situate. It was objected, that here doth not appear to have been [322] any acceptance of the resignation by the archbishop, and that without his acceptance the said rectory of Leythley could not become void. And it was held by the lord chancellor clearly, that the ordinary's acceptance of the resignation is absolutely necessary to make an avoidance: But whether in this case there was a proper resignation and acceptance thereof, he reserved for further consideration; and in the mean time recommended it to the archbishop to produce the resignation in court.—Afterwards, on the 17th of April, 1755, the cause came on again to be heard, and the resignation was then produced; but the counsel for the executors of the late marquis declaring that they did not intend to make any further opposition, the lord chancellor gave no opinion upon the resignation, or the effect of it; but in the course of the former argument, he held, that the acceptance of a resignation by the ordinary is necessary to make it effectual, and that it is in the power of the ordinary to accept or refuse a resignation.

And in the case of *Heskett* and *Grey*, *H.* 28 *G.* 2., where a general bond of resignation was put in suit, and the defendant pleaded that he offered to resign, but the ordinary would not accept the resignation; the court of king's bench were unanimously of opinion, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper; And judgment was given for the plaintiff. (*b*)

6. After acceptance of the resignation, lapse shall not run but from the time of notice given: It is true, the church is void — From what time lapse

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(*a*) *S. C.* 4 *Bac. Abr.* 472.

(*b*) See Simony, II. 1. Whether the ordinary may refuse to accept a resignation without assigning any cause, or whether in such case he may be compelled to assign a sufficient cause, is undecided. See note (1) in last page.

after resignation shall incur. immediately upon acceptance, and the patron may present if he please; but as to lapse, the general rule that is here laid down, is the unanimous doctrine of all the books. Insomuch that if the bishop who accepted the resignation, dies before notice given, the six months shall not commence till notice is given by the guardian of the spiritualties, or by the succeeding bishop; with whom the act of resignation is presumed to remain. *Gibs.* 823.

[323] Corrupt resignation. 7. By the 31 *El.* c. 6. If any incumbent of any benefice with cure of souls, shall corruptly resign the same; or corruptly take for or in respect of the resigning the same, directly or indirectly, *any pension*, sum of money, or other benefit whatsoever: as well the giver, as the taker, of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record. § 8.

Any pension] Before this statute, the bishop in cases of resignation might and did frequently, assign a pension during life, out of the benefice resigned, to the person resigning. *Gibs.* 822.

And by the statute of the 26 *H.* 8. c. 3. intitled, *an act for the payment of first fruits and tenths*, it was enacted, that incumbents charged with pensions payable to their predecessors during their lives, should deduct the tenth part thereof out of such payment, inasmuch as they were charged by the said act to pay the tenths of their whole living unto the king.

And by the same act it was provided, that no pension thereafter should be assigned by the ordinary, or by any other manner of agreement by collateral security or otherwise, upon any resignation of any dignity, benefice, or promotion spiritual, above the value of the third part of the dignity, benefice, or promotion spiritual resigned.

But now by the aforesaid act of 31 *El.* no pensions whatsoever can be reserved. See Pension.

Respond.

RESPOND was a short anthem sung, after reading three or four verses of a chapter; after which the chapter did proceed. *Gibs.* 263.

Restoration of King Charles the Second. See Holidays.

Review (Commission of). See Appeal.

Rochet.

ROCHET (a part of the episcopal habit) is a linen garment gathered at the wrists; and differeth from a surplice, in that a surplice had open sleeves hanging down, but a rochet hath close sleeves. *Lindw.* 251.

It was also one of the sacerdotal vestments; and in that respect differed from a surplice, in that it had *no* sleeves. *Lindw.* 252.

Rogation days. See Holidays.
Right of patronage. See Advowson.
Rural dean. See Deans.
Sabbath. See Lord's day.

Sacraments.

ART. 35. There are two sacraments ordained of Christ our Lord in the gospel, that is to say, baptism and the supper of the Lord.

Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony, and extreme unction, are not to be counted for sacraments of the gospel: being such as have grown partly of the corrupt following of the apostles, partly are states of life allowed by the scriptures; but yet have not like nature of sacraments with baptism and the Lord's supper, for that they have not any visible sign or ceremony ordained of God.

For the sacrament of baptism, See the title **Baptism.**

For the sacrament of the Lord's supper, See the title **Lord's Supper.**

Sacrilege. See Church.
Sanctuary. See Church.

Schools. [325]

THE determinations in the courts of law, relative to this title, do not seem to be delivered with that precision which is usual in other cases. And indeed, excepting in an instance or two in the court of chancery (as will appear), the general law

concerning schools doth not seem to have been considered as yet upon full and solemn argument. And therefore liberty of animadversion is taken in some of the following particulars which would not be allowable in matters finally adjudged and settled.

Power of foundation.

1. By the 7 & 8 *W. c.* 37. Whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found schools for the encouragement of learning, or to augment the revenues of schools already founded; it shall be lawful for the king to grant licenses to aliene, and to purchase and hold in mortmain.

But by the 9 *G.* 2. *c.* 36. After June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor any sum of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given or any ways conveyed or settled (unless it be *boná fide* for full and valuable consideration, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever; unless such appointment of lands, or of money or other personal estate (other than stocks in the public funds,) be made by deed indented, sealed, and delivered in the presence of two witnesses, twelve calendar months at least before the death of the donor, and be enrolled in chancery within six calendar months next after the execution thereof; and unless such stock in the public funds be transferred in the public books usually kept for the transfer of stock, six calendar months at least before the death of the donor: and unless the same be made to take effect
[326] in possession for the charitable use intended, immediately from the making thereof, and be without power of revocation. And any assurance otherwise made shall be void. (*c*)

Attorney-General v. *Whitely*. In this case it appeared that certain funds had been given at several times towards the foundation and support of a free-grammar school at Leeds, for teaching grammatically the learned languages. Application was now made that part of the funds might be applied for the purpose of procuring masters to teach the French and German languages,

(*c*) For the exposition of this act with regard to schools, see Mortmain, *vol.* ii. *p.* 561. And note Ld. *Hardwicke's* opinion in *Att. Gen.* v. *Middleton*, 2 *Ves.* 330. That though a contrary policy prevailed at the time of the reformation, the poor had better now be trained to agriculture than to school; [and see Charitable Uses.]

and of promoting other objects with a view to commerce. It was alleged that the town of Leeds and its neighbourhood had of late years increased very much in trade and population, and therefore the learning of the French and other modern languages was become a matter of great utility to its merchants and inhabitants. The lord chancellor rejected the application on the ground that the nature of a charity could not be changed by transferring it to objects different from those intended by the founder merely on the notion of an advantage to the inhabitants of the place. 11 *Ves.* 241.; [and see *Att. Gen.* v. *Hartley*, 2 *Jac. & Walk.* 325.]

2. By *Can.* 77. No man shall teach either in public school or private house, but such as shall be allowed by the bishop of the diocese, or ordinary of the place, under his hand and seal; being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true religion; and also except he first subscribe simply to the first and third articles in the 36th canon, concerning the king's supremacy and the 39 articles of religion, and to the two first clauses of the second article concerning the book of common prayer, viz. that it containeth nothing contrary to the word of God, and may lawfully be used. Licence.

And in the case of *Cory* and *Pepper*, *T.* 30 *Car.* 2. a consultation was granted in the court of king's bench, against one who taught without license in contempt of the canons; and (the reporter says) the reason given by the court was, that the canons of 1603 are good by the statute of the 25 *Hen.* 8. so long as they do not impugn the common law, or the prerogative royal. 2 *Lev.* 222. *Gibs.* 995.

But this is unchronological and absurd: and as the office of a schoolmaster is a lay office (for where it is supplied by a clergyman, that is only accidental, and not of any necessity at all): it is clear enough, that the canon by its own strength in this case is not obligatory.

Therefore we must seek out some other foundation of the ecclesiastical jurisdiction: and there are many quotations for this purpose fetched out of the ancient canon law (*Gibs.* 1099.); which although perhaps not perfectly decisive, yet it must be owned they bear that way.

The argument in *Cox*'s case, seemeth to contain the substance of what hath been alleged on both sides in this matter; and concludeth in favour of the ecclesiastical jurisdiction. Which was thus: *M.* 1700. In the chancery; Cox was libelled against in the spiritual court at Exeter, for teaching school without license from the bishop: And on motion before the lord chancellor, an order was made, that cause should be shewn why a prohibition [327] should not go, and that in the mean time all things should stay. On shewing cause, it was moved to discharge the said order,

suming to teach contrary to this act, and being thereof lawfully convict, shall be disabled to be a teacher of youth, and suffer imprisonment without bail or mainprize for one year.

The following case seemeth to have happened upon this statute; which in the adjudication, by some oversight, hath not been attended to: viz. *E.* 13 *W. K.* and *Douse*. The defendant was indicted for having kept a school without licence of the bishop of the diocese, against the form of the statute. Upon which it was moved to quash the indictment (being removed into the king's bench by certiorari), and the exceptions taken to the indictment were, 1. That there was no statute that prohibited keeping school without licence, but the 1 *J. c.* 4. § 9. and the said act prescribed another method of proceeding. 2. This indictment was found before the justices of the peace at the quarter sessions; and they have no power by the act, and therefore it was void. 3. This school was not within the act of the 1 *Ja.* because the act extends but to grammar schools; and this school was for writing and reading. And afterwards, after a rule made to shew cause, the indictment was quashed. *L. Raym.* 672.

Further: By the 1 *Ja. c.* 4. § 9. No person shall keep any school or be a schoolmaster out of any of the universities or colleges of this realm, except it be in some public or free grammar school, or in some such nobleman's or gentleman's house as are

[330] not recusants, or where the same schoolmaster shall be specially licensed thereunto by the archbishop, bishop, or guardian of the spiritualties of that diocese; upon pain that as well the schoolmaster, as also the party that shall retain or maintain any such schoolmaster, shall forfeit each of them for every day so wittingly offending 40*s.*; half to the king and half to him that shall sue.

And by the 13 *&* 14 *C.* 2. *c.* 4. Every schoolmaster keeping any publick or private school, and every person instructing or teaching any youth in any house or private family as a tutor or schoolmaster, shall before his admission subscribe the declaration following, *viz.* "*I A. B. do declare, that I will conform to the* "*liturgy of the church of England as it is now by law established.*" Which shall be subscribed before the archbishop, bishop, or ordinary of the diocese; on pain that every person so failing in such subscription shall forfeit his school, and be utterly disabled and *ipso facto* deprived of the same, and the said school shall be void as if such person so failing were naturally dead.

And if any schoolmaster, or other person, instructing or teaching youth in any private house or family as a tutor or schoolmaster, shall instruct or teach any youth as a tutor or schoolmaster, before licence obtained from the archbishop, bishop, or ordinary of the diocese, according to the laws and statutes of this realm, (for which he shall pay 12*d.* only) and before such subscription as aforesaid; he shall for the first offence suffer three

months' imprisonment without bail; and for every second, and other such offence, shall suffer three months' imprisonment without bail, and also forfeit to the king the sum of 5*l*. § 8, 9, 10, 11.

M. 9. *G.* 2. The *King* against *The bishop of Litchfield and Coventry.* A mandamus issued to the bishop, to grant a license to Rushworth a clergyman, who was nominated usher of a free grammar school within his diocese. To which he returned, that a caveat had been entered by some of the principal inhabitants of the place, with articles annexed, accusing him of drunkenness, incontinency, and neglect of preaching and reading prayers; and that the caveat being warned, he was proceeding to inquire into the truth of these things when the mandamus came: and therefore he had suspended the licensing him. And without entering much into the arguments, whether the bishop hath the power of licensing; the court held, that the return should be allowed as a temporary excuse: for though the act of the 13 & 14 *C.* 2. *c.* 4. obligeth them only to assent to and subscribe the declaration, yet it adds, *according to the laws and statutes of this realm,* which presupposeth some necessary qualifications, which it is reasonable should be examined into. *Str.* 1023. [331]

The ordinary may examine a schoolmaster applying for a licence, as to his morality, religion, and learning.

[The ordinary may also examine the party applying for a licence to teach a grammar school, as to his *learning*, as well as his morality and religion; and it is a good return to a *mandamus* to the ordinary to grant a licence, to state that he suspended the granting of it until the party would submit himself to be examined "touching his sufficiency in learning." *Rex* v. *The Archbishop of York*, 6 *Term Rep.* 490.]

After license obtained; the schoolmaster must take the oaths and exhibit a certificate of his having received the sacrament, at the quarter sessions, as other persons qualifying for offices. (*g*)

And by *Can.* 137. Every schoolmaster shall, at the bishop's first visitation, or at the next visitation after his admission, exhibit his license, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected.

Roman catholic school-masters.

3. By the 11 and 12 *W.* *c.* 4. If any papist, or person making profession of the popish religion, shall keep school, or take upon himself the education or government or boarding of youth; he shall be adjudged to perpetual imprisonment, in such place within

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(*g*) He must also take the oaths, and sign such of the oaths and declarations required by the 13 & 14 *Car.* 2. *c.* 4. § 8. and 25 *Car.* 2. *c.* 2. § 2. as are not abolished, and the new oaths, or oaths substituted in lieu thereof; and receive the sacrament within three months after admission; the oaths seem to be the oaths of allegiance, abjuration, and supremacy. If not qualified, he is *ipso facto* deprived, notwithstanding a peremptory mandamus had been granted for restoring him. Serjt. *Hill's* MSS.

this kingdom, as the king by advice of his privy council shall appoint. § 3.

[But by 31 *G.3. c.32.* § 13—17. No ecclesiastic or other person professing the Roman catholic religion who shall take and subscribe the oath of allegiance, abjuration, and declaration, thereby prescribed (for which see Oaths, 20. B.), shall be prosecuted in any court whatsoever for teaching and instructing youth as a tutor or schoolmaster. But before any person shall be permitted to keep a school for the education of youth, his or her name as a Roman catholic schoolmaster or schoolmistress shall be recorded at the quarter or general session of the peace for the county or other division or place where such school shall be situated, by the clerk of the peace of the said court, who is to record such name and description, and to give a certificate thereof on demand. Provided that nothing in that act contained, shall make it lawful to found, endow, or establish any religious order or society of persons bound by monastic or religious vows, or any school, academy, or college, by persons professing the Roman catholic religion, within these realms, or the dominions [332] thereunto belonging; and that all uses, trusts, and dispensations, whether of real or personal property, which immediately before the 24th June 1791, shall be deemed to be superstitious or unlawful, shall continue to be so deemed and taken. Provided also that no person professing the Roman catholic religion shall obtain or hold the mastership of any college or school of royal foundation, or of any endowed college or school for the education of youth, or shall keep a school in either of the universities, or shall receive into his school for education the child of any protestant father.

By the 1 *W. c.18.* commonly called the act of toleration; neither the 17 *C. 2. c.2.* [against dissenters teaching public or private schools on 40*s.* penalty, now repealed by 52 *G.3. c.155.* § 1.] nor the before-recited act of the 23 *Eliz. c.1.*, nor any other made against papists or popish recusants (except as therein excepted), shall extend to protestant dissenters qualified according to that act.

And by the 19 *G.3. c.44.* § 2. No dissenting minister, nor any other protestant dissenting from the church of England, who shall take the oaths and subscribe the declaration directed by the said act of 1 *W.*, and another declaration injoined by this present act (for which see title Dissenters), shall be prosecuted in any court whatsoever for teaching and instructing youth as a tutor or schoolmaster. § 3. Provided that this shall not extend to the enabling any person dissenting from the church of England to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same shall have been founded since the first

year of William and Mary, for the immediate use and benefit of protestant dissenters.

5. In *Bales's* case, *M.* 21 *C.* 2., it was held, that where the patronage is not in the ordinary, but in feoffees or other patrons; the ordinary cannot put a man out: and a prohibition was granted; the suggestion for which was, that he came in by election, and that it was his freehold. 2 *Keb.* 544.

Whether the ordinary may proceed to deprivation, for teaching without licence. (2)

Upon which Dr. Gibson justly observes, that if this be any bar to his being deprived by ordinary authority; the presentation to a benefice by a lay patron, and the parson's freehold in that benefice, would be as good a plea against the deprivation of the parson by the like authority. And yet this plea hath been always rejected by the temporal courts. And in one circumstance at least, the being deprived of a school, notwithstanding the notion of a freehold, is more naturally supposed, than deprivation of a benefice; because the licence to a school is only during pleasure, whereas the institution to a benefice is absolute and unlimited. *Gibs.* 1110.

6. By *Can.* 78. In what parish church or chapel soever there is a curate, which is a master of arts, or bachelor of arts, or is otherwise well able to teach youth, and will willingly so do, for the better increase of his living, and training up of children in principles of true religion; we will and ordain, that a licence to teach youth of the parish where he serveth, be granted to none by the ordinary of that place, but only to the said curate; provided always, that this constitution shall not extend to any parish or chapel in country towns, where there is a public school founded already; in which case, we think it not meet to allow any to teach grammar, but only him that is allowed for the said public school.

In what case curates shall have the preference in teaching schools.

7. By *Can.* 79. All schoolmasters shall teach in English or Latin, as the children are able to bear *the larger or shorter catechism*, heretofore by public authority set forth. And as often as any sermon shall be upon holy and festival days, within the parish where they teach, they *shall bring their scholars to the church* where such sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine them at times convenient after their return, what they have borne away of such sermons. Upon other days, and at other times, they shall train them up with such sentences of holy scriptures, as shall be most expedient to induce them to all godliness. And they shall teach the *grammar* set forth by king Henry the eighth, and continued in the times of king Edward the sixth and queen [334] Elizabeth, of noble memory, and none other. And if any school-

Order to be observed therein.

(2) As to election of schoolmaster under deed of founder, see *Withell, clerk,* v. *Gartham, clerk,* 1 *Esp. N.P.C.* 322.

master, being licensed, and having subscribed as is aforesaid, shall offend in any of the premises, or either speak, write, or teach against any thing whereunto he hath formerly subscribed, if upon admonition by the ordinary he do not amend and reform himself, let him be suspended from teaching school any longer.

The larger or shorter catechism] The larger is that in the book of common prayer: The shorter was a catechism set forth by king Edward the sixth, which he by his letters patents commanded to be taught in all schools; which was examined, reviewed, and corrected in the convocation of 1562, and published with those improvements in 1570, to be a guide to the younger clergy in the study of divinity, as containing the sum and substance of our reformed religion. *Gibs.* 374.

Shall bring their scholars to the church] *E.* 10 & 11 *W. Belcham* and *Barnardiston.* The chief question was, whether a schoolmaster might be prosecuted in the ecclesiastical court for not bringing his scholars to church, contrary to this canon. And it was the opinion of the court that the schoolmaster, being a layman, was not bound by the canons. 1 *P. Will.* 32.

Grammar] Compiled and set forth by William Lilly and others specially appointed by his majesty: in the preface to which book it is declared, that "as for the diversity of grammars, " it is well and profitably taken away by the king's majesty's " wisdom; who foreseeing the inconvenience, and favourably " providing the remedy, caused one kind of grammar by sundry " learned men to be diligently drawn, and so to be set out only; " every where to be taught for the use of learners, and for avoid- " ing the hurt in changing of schoolmasters."

Subject to a commission of pious uses, where there is no visitor.

8. By the 43 *El. c.* 4. Where lands, rents, annuities, goods, or money, given for maintenance of free schools or schools of learning, have been misapplied, and there are no special visitors or governors appointed by the founder; the lord chancellor may award commissions under the great seal to inquire and take order therein.

Whether the visitors' power is conclusive. (3)

9. Whether a mandamus lieth for restoring a schoolmaster or usher, when in fact they have been deprived by the local visitors, is doubtfully spoken of in the books of common law; and the

(3) Where the king is founder, the crown is always visitor: but where a private person is founder, his heirs are visitors: but the founder may vest a visitatorial power in any other person or his heirs. *Eden* v. *Foster*, case of *Birmingham* school, 2 *P. W.* 325. *Gilb. Rep.* 178. *Sel. Ch. Ca.* 36. And in the latter case the visitor being local, the court cannot interpose by granting a commission. *Att. Gen.* v. *Price*, case of *Berkhampstead* school, 3 *Atk.* 196. Local visitors only visit every three years, but may hear complaints in the meantime; and it was said that if a visitor's reward is too small, the court may augment it. *S. C.*

pleadings upon them seem not to touch the present point, but to turn chiefly upon this, whether they are to be accounted offices of a public or private nature. *Gibs.* 1110.

Thus in the case of The *King* against *the bailiffs of Morpeth.* A mandamus was granted, to restore a man to the office of under-schoolmaster of a grammar school at Morpeth, founded by king Edward the sixth; the same being of a public nature, being derived from the crown. *Str.* 58. [335]

And the distinction seemeth to be this: If they shall be deemed of a public nature, as constituted for public government; they shall be subject to the jurisdiction of the king's courts of common law; but if they be judged matters only of private charity, then they are subject to the rules and statutes which the founder ordains, and to the visitor whom he appoints, and to no other. *L. Raym.* 5.

In the case of colleges in the universities, whether founded by the king or by any other, it seemeth now to be settled, that they are to be considered as private establishments, subject only to the founder, and to the visitor whom he appointeth; and it doth not seem easy to discern any difference between schools and colleges in this respect. (*h*)

Governors *eo nomine* are not visitors.

10. *H.* 1725. *Eden* and *Foster.* The free grammar school of Birmingham was founded by king Edward the sixth, who endowed the said school, and by his letters patent appointed perpetual governors thereof, who were thereby enabled to make laws and ordinances for the better government of the said school; but by the letters patent no express visitor was appointed, and the legal estate of the endowment was vested in these governors. After a commission had issued under the great seal to inspect the management of the governors, and all the exceptions being already heard and over-ruled, it was now objected to this commission, that the king having appointed governors, had by implication made them

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The founder of *Woodbridge Free school* directed the heirs male of his feoffees to appoint a master; and on their default, that the right of election should be in the curate and churchwardens, and six chief inhabitants. The chief inhabitants at the time of the foundation, and the heir of the last surviving feoffee, could not be discovered, so that the lord Chancellor became visitor in right of the crown. Two persons were elected at the last vacancy; and on petition the chancellor declared both elections void. He doubted the visitor's power to elect a master, but directed a reference to the attorney-general, to report what directions or alterations would be proper, as to the mode and right of election, and in the orders, &c. of the school; and what to him should seem most conducive to the interests of the objects of the charity and the furtherance of the donor's intentions. *Att. Gen.* v. *Black,* 11 *Ves.* 191.

(*h*) For the general power and jurisdiction of a visitor, see **Colleges,** 6, 7.; and **Hospitals,** 3.; **Charitable Uses.**

visitors likewise; the consequence of which was, that the crown could not issue a commission to visit or inspect the conduct of these governors. The matter first came on before lord chancellor Macclesfield, and afterwards before lord King, who desired the assistance of lord chief justice Eyre, and lord chief baron Gilbert; and accordingly the opinion of the court was now delivered *seriatim*, that the commission was good. 1. It was laid down as a rule, [336] that where the king is founder, in that case his majesty and his successors are visitors; but where a private person is founder, there such private person and his heirs are by implication of law visitors. 2. That though this visitatorial power did result to the founder and his heirs, yet the founder might vest or substitute such visitatorial right in any other person or his heirs. 3. They conceived it to be unreasonable, that where governors are appointed, these by construction of law, and without any more, should be visitors, should have an absolute power, and remain exempt from being visited themselves. And therefore, 4. That in those cases where the governors or visitors are said not be accountable, it must be intended, where such governors have the power of government only, and not where they have the legal estate and are intrusted with the receipt of the rents and profits (as in the present case); for it would be of the most pernicious consequence, that any persons intrusted with the receipt of rents and profits, and especially for a charity, though they misemploy never so much these rents and profits, should yet not be accountable for their receipts; this would be such a privilege, as might of itself be a temptation to a breach of trust. 5. That the word "governor" did not itself imply visitor; and to make such a construction of a word, against the common and natural meaning of it, and when such a strained construction could not be for the benefit, but rather to the great prejudice of the charity, would be very unreasonable; besides it would be making the king's charter operate to a double intent, which ought not to be. And the commission under the great seal was resolved to be well issued. *2 P. Will.* 325.

Whether the trust surviveth on the feoffees dying away beyond the limited number.

11. The following case relateth particularly to a church; but is equally applicable to and far more frequently happeneth in the case of schools. It is that of *Waltham* church, *H.* 1716. Edward Denny, earl of Norwich, being seised by grant from king Edward the sixth, of the scite and demesnes of the dissolved monastery of Waltham Holy Cross, and of the manor of Waltham, and of the patronage of the church of Waltham, and of the right of nominating a minister to officiate in the said church, it being a donative, the abbey being of royal foundation, by his will in 1636, amongst other things the said earl devised a house in Waltham, and a rent-charge of 100*l.* a-year, and ten loads of wood, to be annually taken out of the forest of Waltham, and his right of nominating a minister to officiate in the said church, to six trus-

tees and their heirs, of which sir Robert Atkins was one, in trust for the perpetual maintenance of the minister, to be from time to time nominated by the trustees: and directed that when the trustees were reduced to the number of three, they should choose others. It so fell out that all the trustees, except sir Robert Atkins, were dead; and he alone took upon him to enfeoff others to fill up the number; and now the surviving trustees (of the said sir Robert's appointment) did nominate Lapthorn to officiate; and the lady Floyer and Campion, who were owners of the dissolved monastery and of the manor, claimed the right of nomination to the donative, and had nominated Cowper to officiate there, and he was got into possession. The bill was, that Lapthorn might be admitted to officiate there, to be quieted in the possession, and to have an account of the profits. By the defendants it was amongst other things insisted, that the trustees having neglected to convey over to others, when they were reduced to the number of three, and the legal estate coming only to one single trustee, he had not power to elect others; but by that means the right of nomination resulted back to the grantor, and belonged to the defendants, who had the estate, and stood in his place: or at least the court ought to appoint such trustees as should be thought proper. By *Cowper*, lord chancellor; It is only directory to the trustees, that when reduced to three, they should fill up the number of trustees; and therefore although they neglected so to do, that would not extinguish or determine their right; and sir Robert Atkins, the only surviving trustee, had a better right than any one else could pretend to, and might well convey over to other trustees; it was but what he ought to have done: and it was decreed for the plaintiff with costs, and an account of profits; but the master to allow a reasonable salary to Cowper, whilst he officiated there. 2 *Vern.* 749.

12. By the 43 *Eliz. c.* 2. All lands within the parish are to be assessed to the *poor* rate. **Taxes.**

But by 38 *Geo.* 3. *c.* 5. it is provided, that the same shall not extend to charge any masters or ushers of any schools, for or in respect of any stipend, wages, rents, or profits, arising or growing due to them, in respect of their said places or employments. § 25.

Provided that nothing herein shall extend to discharge any tenant of any the houses or lands belonging to the said schools, who by their leases or other contracts are obliged to pay all rates, taxes, and impositions whatsoever; but that they shall be rated [338] and pay all such rates, taxes, and impositions. § 27.

And in general, it is provided, that all such lands, revenues, or rents settled to any charitable or pious use, as were assessed in the 4th year of *Will & Mar.* shall be liable to be charged; and that no other lands, tenements, or hereditaments, revenues,

or rents whatsoever, then settled to any charitable or pious uses, as aforesaid shall be charged. § 29.

And the reason of this distinction seemeth to be, because in that year, the sums to be charged were fixed and determined upon every particular division; lands which were then appropriated to charities being exempted out of the valuation: therefore it is no hardship upon the neighbourhood, that lands then exempted should be exempted still, for the other lands pay no more upon the account of such exemption: but if lands appropriated to charities since that time should by such appropriation become exempted, this would lay a greater burden upon all the rest, because the same individual sum upon the whole division is to be raised still.

[Scotland.

BY 5 and 6 *Ann. c.* 8. Article XXV. the tenor of the act of parliament of Scotland "For securing the protestant religion and presbyterian church government within the kingdom "of Scotland," is as follows: "Her Majesty, with advice and consent of the estates of parliament, doth establish and confirm the true protestant religion, and the worship, discipline, and government of this church, to continue without any alteration to the people of this land, in all generations, and more especially the 5th act of the first parliament of King *William* and queen *Mary*, intituled *Act ratifying the Confession of Faith, and settling presbyterian church government*, with all other acts of parliament relating thereto; and declares, that the foresaid true protestant religion, contained in the Confession of Faith, with the form and purity of worship in use within this church, and its presbyterian church government and discipline, by kirk-sessions, presbyteries, provinces, synods, and general assemblies, shall remain unalterable, and that the said presbyterian government shall be the only government of the church of Scotland." § 5.

"The universities and colleges of *St. Andrews, Glasgow, Aberdeen*, and *Edinburgh*, as established by law, shall continue for ever; and no professors, principals, regents, masters, or others, bearing office in any university, college, or school, within this kingdom, shall be admitted to their functions, but such as shall acknowledge the civil government in manner prescribed by acts of parliament: as also at their admissions shall profess, and shall subscribe to the aforesaid Confession of Faith, and that they will conform themselves to the worship in use in this church, and submit themselves to the government and discipline thereof, and

never endeavour the prejudice or subversion of the same; and that before the respective presbyteries of their bounds. None of the subjects of this kingdom shall be liable to any oath, test, or subscription within this kingdom, inconsistent with the foresaid true protestant religion, and presbyterian church government, worship, and discipline; and after the decease of her majesty, the sovereign succeeding in the royal government of the kingdom of Great Britain, in all time coming, at his accession to the crown, shall swear and subscribe, that they shall inviolably maintain and preserve the aforesaid settlement of the true protestant religion, with the government, worship, discipline, right and privileges of this church. *This act* shall be a fundamental and essential condition of union betwixt the two kingdoms, and shall be inserted in any act of parliament for concluding the union; nevertheless, the parliament of England may provide for the security of the church of England, as they think expedient, to take place within the bounds of England, and not derogating from the security above provided for the church of Scotland; as also the parliament of England may extend the provisions contained in the articles of union in favour of the subjects of Scotland, to those of England: all laws in this kingdom, so far as they are inconsistent with the articles, shall after the union become void." 5 & 6 *A. c.*8. § 1—6.

The act "For securing the church of England, as by law "established," *viz.* 5 & 6 *A. c.*5., is also inserted. § 7—9.

The said articles of union, and also the said act of parliament of Scotland, for establishing the protestant religion and presbyterian church government within that kingdom, shall be for ever confirmed. § 10.

The said act for securing the church of England, as by law established; and also that of Scotland, for securing the protestant religion and presbyterian church government shall for ever be observed as fundamental and essential conditions of the union. 5 & 6 *A. c.*8. § 11.

And the Scotch establishment was again confirmed on the union of Great Britain with Ireland, in these words, "And in like manner the doctrine, &c. of the church of Scotland shall remain as now by law and by the acts of union, 5 & 6 *A. c.*8. *art.*25. established. 39 & 40 *G.*3. *c.*67. *art.*5.]

Seats in churches. See **Church.**

Sees of bishops. See **Cathedrals.**

Select vestry. See Vestry, in the title **Church.**

Sentence.

A SENTENCE is either *definitive* or *interlocutory:*

A *definitive* sentence is that, which puts an end to the suit in controversy, and regards the principal matter in question:

An *interlocutory* sentence determines only some incident or emergent matter in the proceeding, as some exception, or the like; but doth not affect the principal matter in controversy; *Ayl. Par.* 487.

By the ancient canon law, sentence of suspension, or excommunication, ought not to be given without a previous admonition: unless the offence is such as in its own nature immediately requires such sentence. In archbishop *Arundel's* Register, [339] mention is made of an appeal from a sentence of suspension, as unjust for want of a canonical admonition. *Gibs.* 1046.

And every sentence must be in writing; otherwise it deserves not the name of a sentence, and needeth not the formality of an appeal to reverse it. *Id.* 1047. (*i*)

[And by 55 *G.* 3. *c.* 184. Part the Second. Every definitive sentence or final decree must be on a stamp of five shillings.

And the sentence must be pronounced in the presence of both parties; otherwise, sentence given in the absence of one of the parties is void. *Id.*

Sentences upon the church wall. See Church.

Separatists. See Dissenters.

Sequestration.

During the vacancy of a benefice.

1. WHEN a living becomes void by the death of an incumbent, or otherwise; the ordinary is to send out his sequestration, to have the cure supplied, and to preserve the profits (after the expences deducted) for the use of the successor. *God.* Append. 14.

Where none will accept the benefice.

2. Sometimes a benefice is kept under sequestration for many years together, or wholly; namely, when it is of so small value, that no clergyman fit to serve the cure will be at the charge of taking it by institution: In which case, the sequestration is

(*i*) That is, by the canon law, must be reduced to writing, and then pronounced in the presence of the parties by the judge standing. *C.* 2. 1. 8. *C.* 3. 9. 11. *Inst. J. C.* 3. 15. [It may be pleaded briefly in the temporal courts, without showing the manner thereof and of their proceedings. *Freem.* 84. 2 *Bulstr.* 182.]

committed sometimes to the curate only, sometimes to the curate and churchwardens jointly. *Johns.* 121. [See for this Vacation.]

3. Sometimes the fruits and profits of a living which is in controversy, either by the consent of parties, or the judge's authority, are sequestered and placed for safety, in a third hand. And thus where two different titles are set on foot, the rights are carefully preserved, and given to him for whom the cause is adjudged. *God. Append.* 14. — During suit.

And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church to the parson that he orders to attend the cure. *Watson, c.* 30. [340]

4. Sometimes for neglect of serving the cure, the profits of the living are to be sequestered. *Id.* 15. — Neglect of duty.

5. Sometimes upon the king's writ to the bishop, to satisfy the debts of the incumbent. *Id.* — Debt.

And this is, where a judgment hath been obtained against a clergyman, and upon a *fieri facias* directed to the sheriff to levy the debt and damages, he returns, that the defendant is a clerk beneficed having no lay fee. Whereupon a *fieri* or *levari facias* is directed to the bishop to levy the same of his ecclesiastical goods, and by virtue thereof the tithes shall be sequestered. (4) Or a *sequestrari facias* may be issued for the same purpose. (*k*) The writ

(4) *Gilb. Exec.* 26. *Bac. Ab.* tit. *Execution,* 360. See 3 *B.* & *P.* 326.

(*k*) "All such writs of *levari facias,* which I have discovered, either in the *Register,* or in *Fitzherbert,* are in a form agreeable to what is here mentioned, without any order for or mention of a sequestration: and yet, in 1 *Mod.* 260. *North* C. J. takes notice that thereupon the bishop used to sequester the ecclesiastical possessions of the defendant; but that is not properly a sequestration: for the ordinary must not return *sequestrari feci.* He must return *fieri feci,* or *nulla bona,* in like manner as a sheriff of a county must do. This I have known in experience that a bishop has been ordered in such a case to amend his return. And in *Freem. Rep.* vol. i. p. 231. lord *North* is reported to have said, that the ordinary in such case is but the ecclesiastical sheriff: and therefore in the case of Bishop *Wren* the court compelled him to make the same return as the sheriff should have done in the like case; and refused to accept of his return, that he had granted a sequestration, but would have either a *fieri feci* or a *nulla bona.* And in the report of the same case in 2 *Mod.* 257, 258. *North* is stated to have said that the ordinary may seize ecclesiastical things, and sell them, as the sheriff may temporal things upon a *fieri facias.* But it is to be observed, that he must return *fieri feci,* and not *sequestrari,* upon this writ. *Blackstone* (3 *Com.* 418.) copies after *Burn* as to the execution of the writ by sequestration, and refers to

of *fieri* or *levari facias de bonis ecclesiasticis* is similar to a common *fieri facias*, and the bishop, who is in the nature of a temporal officer or ecclesiastical sheriff (5) may seize and sell the profits of the benefice, but he must return *fieri* or *levari feci*, and not *sequestrari feci*, on this writ. (5) He may also, like the sheriff, be called on by rule to return the writ, (6) and if he makes a false return, will be liable to an action. (7) Upon this writ the bishop or his officer, makes out a sequestration directed to the church-wardens, or, on proper security given, to persons of the plaintiff's own appointment, requiring them to sequester the tithes and other profits of the benefice; which sequestration should be forthwith duly *published* by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon; for where a sequestration was made out and not published while the writ was in force, but was stayed in the register's hands by desire of plaintiff's attorney, the court held that it had no priority as against other sequestrations afterwards duly made out, and duly published, but that if it had been published, the execution would have taken effect and must have been first satisfied notwithstand-

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Burn, but cites no authority for the execution; though he does for the form of the writ of *levari* or *fieri facias* to the bishop. *N. B.* There seems to be an inconsistency in the opinion of lord *North*, that a bishop is to sequester, and yet cannot return that he has done so, but must return either a *fieri feci* or a *nulla bona*: for, if he was to return a *fieri feci*, it seems that he might be ruled to bring the money into court; and, if he was to return *nulla bona* when the defendant had an ecclesiastical living, the plaintiff might have an action on the case for a false return. 1 *Sid.* 276. It therefore seems, the ordinary might return a sequestration, where the writ is to levy the debt *de bonis ecclesiasticis*, as well as when, instead of such a writ, a writ of sequestration is granted to sequester."—Serjt. *Hill*'s MSS. [*Semb.* Therefore *a fortiori* such a return may be made to a *sequestrari facias* which directs the bishop to *take and sequester* the living, till he has levied the debt, &c. of the ecclesiastical profits there. See *Tidd*'s App. *c.* xxxix. § 72.]

(5) *Walwyn* v. *Auberry*, 1 *Mod.* 260. 2 *Mod.* 257, 258. 1 *Freem.* 230. S. C. *Hubbard* v. *Beckford*, 1 *Hagg. Rep.* 307.

(6) *The King* v. *Bp. of London*, 1 *D & R. Rep.* 486. *Languit* v. *Jones*, *Stra.* 87. S. P. In *The King* v. *Bishop of London* (1822), where four writs of sequestration, at suit of different annuity creditors, had been issued by the same attorney, the plaintiff's annuity being prior to the others in date, but entered second by the bishop's registrar in the book kept in the office; the court of K. B. granted a rule to the bishop to return what he had levied, and to give precedence to the plaintiff's suit, on the terms of giving the bishop the costs of his appearing. In this respect, the bishop only acts as sheriff, and the court has the same power over him as they have over that officer.

(7) 1 *Sid.* 276. *Gilb. Ex.* 26. *Moseley* v. *Warburton*, 1 *Salk.* 320. *Raym.* 265. S. C.

ing it was then returnable (8), for the power of a sequestration dates from its *publication:* Thus where after expiration of notice to quit the glebe a sequestration was published, a demise by the rector laid on the day after the expiration of the notice and preceding the publication is good, though the bishop had indorsed the writ "Let sequestration issue." (9) The writ of *fieri* or *levari facias de bonis ecclesiasticis* is a continuing execution; and if the sequestration issue and is published before the writ is returnable, it is sufficient, and plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ. (8) Yet if it be actually returned, the authority of the bishop is at an end. Therefore where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits accruing as well before as after the return day, and being ruled to return the writ, returned only the amount of the sum levied up to the return day, the court of C. P. would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied up to the time when the writ was actually returned (1); the proper way would have been to have ruled the bishop from time to time to know what he had levied. (2) A judgment creditor, who has obtained sequestration of a living, is entitled to an account of the surplus in the hands of a prior sequestrator, after satisfaction of the arrears and growing payments due to the party obtaining the first sequestration; and the court will not take notice of the existence of incumbrances which the party has not followed up with execution and made available. (3)]

And in this case the bishop may name the sequestrators himself, or may grant the sequestration to such persons as shall be named by the party who obtained the writ.

If the sequestration be laid and executed before the day of the return of the writ, the mean profits may be taken by virtue of the sequestration after the writ is made returnable; otherwise not. 3 *Bl. Com.* 418.

6. Sometimes when the houses and chancels that the incumbent is bound to repair are ruined and ready to fall, if after due admonition they shall delay to begin to amend the same within two months; then the bishop of the diocese, that time being

Dilapidations. See tit. Dilapidations.

(8) *Legassicke* v. *Bp. of Exeter*, 1 *Crompt.* 359. *Marsh* v. *Fawcett*, 2 *H. Bla.* 582. But see *Wood's Inst.* 608, 609. 1 *Crompt.* 345. *semb. contra.*

(9) *Doe* d. *Morgan, clerk*, v. *Bluck*, 3 *Campb.* 447.

(1) *Marsh* v. *Fawcett*, 2 *H. Bla.* 582.

(2) *Id.* 583.

(3) *Cuddington* v. *Withy*, 2 *Swanst. Ch. Rep.* 174.

elapsed, shall sequester the fruits and tithes till those defects are amended: and though the admonition proceed from the archdeacon, yet the bishop only hath the power of sequestration. *God. Appen.* 14.

Appeal. 7. *Stratford.* If an appeal be made against a sentence of sequestration, and lawfully prosecuted; the party sequestered shall enjoy the profits, pending the appeal. *Lind.* 104.

Sequestrator's duty. 8. It is usual for the ecclesiastical judge, to take bond of the sequestrators, well and truly to gather and receive the tithes, fruits, and other profits, and to render a just account. *Wats. c.* 30.

And those to whom the sequestration is committed, are to cause the same to be published in the respective churches, in the time of divine service. *Wats. c.* 30.

It is best and most legal for the sequestrators, to receive the tithes and dues in kind.

[341] But the sequestrators cannot maintain an action for tithes in their own name, at the common law, nor in any of the king's temporal courts; but only in the spiritual court or before the justices of the peace where they have power by law to take cognizance. *Johns.* 122.

Thus in the case of *Berwick* and *Swanton*, *T.* 1692. It was resolved in the court of exchequer; that a sequestrator cannot bring a bill alone for tithes; because he is but as a bailiff, and accountable to the bishop, and hath no interest. *Bunb.* 192.

After the sequestrators have performed the duty required, the sequestration is to be taken off, and application of the profits, to be made according to the direction of the ordinary. And he shall allow to them a reasonable sum, out of the profits, according to the trouble they shall have had in gathering the tithes. And he is also to allow for the supply of the cure, what shall be convenient, relation being had to the charge, and to the profits; and likewise for the maintenance of the incumbent and of his family (in case where there is an incumbent), if he hath not otherwise sufficient to maintain them.

If the sequestrators refuse to deliver up their charge, they shall be compelled thereunto by the ecclesiastical judge; and if they shall, being called thereunto, delay to give an account, it is usual for the judge to deliver unto the party grieved the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law. *Wats. c.* 30.

Therefore, if the incumbent is not satisfied with what the sequestrators have done in the execution of their charge, his proper remedy is by application to the spiritual judge; and if he shall think himself aggrieved by the determination of such judge, he may appeal to a superior jurisdiction. Sometimes a bill in equity hath been brought; which yet, as it seemeth, ought not to be brought against the sequestrators solely, for that they are only bailiffs or receivers, and have no interest: As in the case of

Jones and *Barret, H.* 1724. On a bill by the vicar of West Dean in the county of Sussex against the defendant, who was sequestrator, for an account of the profits received during the vacation; it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives; and the court seemed to think the bishop should have been a party; but by consent the cause was [342] referred to the bishop of the diocese. *Bunb.* 192.

[As to sequestration for non-residence, &c. under 57 *Geo.* 3. *c.* 99 See Residence.]

Sermons. See Public worship.

Sexton.

THE *sexton, segsten, segerstane*, (*sacrista*, the keeper of the holy things belonging to the divine worship,) seemeth to be the same with the *ostiarius* in the Romish church; and is appointed by the minister or others, and receiveth his salary according to the custom of each parish.

It hath been adjudged, that a mandamus lies to restore a sexton; though as to this the court at first doubted, because he was rather a servant to the parish than an officer, or one that had a freehold in his place: But upon a certificate shewn from the minister, and divers of the parish, that the custom was to choose a sexton, and that he held it for his life, and that he had 2*d.* a year of every house within the parish; they granted a mandamus directed to the churchwardens to restore him. (4) 3 *Bac.*

(4) *Ile's* case, 1 *Ventr. Rep.* 153, 143. *The King* v. *Kingscleere,* (*Inhabs.*) 2 *Lev.* 18. S. P. Sextons are regarded by common law as having freeholds in their offices; and therefore though they may be punished, they cannot be deprived by ecclesiastical censures. 2 *Roll. Abr.* 234. A return to a mandamus, that L. C. was not duly elected sexton according to the ancient custom, and that there is a custom for the inhabitants, &c. to remove at pleasure, and that L. C. was removed pursuant to such custom, is good. *The King* v. *Churchwarden of Taunton,* 1 *Cowp. Rep.* 413.

Where two parishes had been a long time united, and had had a joint sexton who was paid by both, but afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other, that other parish cannot maintain assumpsit for money paid, laid out, and expended to the use of the first parish, for their *quota* of the sexton's salary; for this was paid against *their express consent.* Nor can the right of the sexton be tried in such case, without his being a party thereto; nor can he bring his action against both parishes on a joint obligation, or against one of them only, for the whole sum. *Stokes* v. *Lewis,* 1 *T. R.* 20.

M. 5 *G. K.* and *the churchwardens of Thame in Oxfordshire.* An application was made to the court of K. B. for a mandamus to restore John Williams to the office of sexton. A return was made, that he held it *at pleasure.* The court refused the mandamus, without a certificate that he was chosen *for life.* *Str.* 115.

T. 12 *G.* *Olive* and *Ingram.* In *assumpsit* for money had and received to the plaintiff's use, a case was made at *nisi prius* for the opinion of the court; that there being a vacancy in the office of sexton of the parish of St. Botolph-without-Aldersgate in the city of London, the plaintiff and Sarah Bly were candidates; and Sarah Bly had 169 indisputable votes, and 40 which were given by women, who were housekeepers and paid to the church and poor; that the plaintiff had 174 indisputable votes, and 22 other votes given by such women as aforesaid; that Sarah Bly was declared duly elected: upon which the plaintiff brought a mandamus, and was sworn in, and the defendant had received 5*s.* belonging to the office. In this case two points were made: 1. Whether a woman was capable of being chosen sexton. And 2. Whether women could vote in the election. As to the first, the court seemed to have no difficulty about it; there having been many cases where offices of greater consequence have been held by women, and there being many women
[343] sextons at that time in London; in the second year of queen Anne, a woman was appointed governor of Chelmsford workhouse: lady Broughton was keeper of the Gatehouse: lady Packington was the returning officer for members at Ailesbury. (5) As to the second point, it was shewn, that women cannot vote for members of parliament or coroners, and yet they have freehold, and contribute to all public charges; and though they vote in the monied companies, yet that is by virtue of the acts which give the right to all persons possessed of so much stock; that military tenures never descended to them. But the court notwithstanding held, that this being an office that did not concern the public, or the care and inspection of the morals of the parishioners; there was no reason to exclude women, who paid rates, from the privilege of voting: they observed, here was no usage of excluding them stated, which perhaps might have altered the case; and that as this case was stated, the plaintiff did not appear to have been duly elected; and therefore there ought to be judgment against him. *Str.* 1114.

(5) Thus Anne, countess of Pembroke, Dorset, and Montgomery, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench. *Harg. Co. Lit.* 326.

Sick.

I. *Visitation of the sick.*
II. *Communion of the sick.*
III. *Departing out of this life.*

I. *Visitation of the sick.*

BY *Can.* 76. When any person is dangerously sick in any parish: the minister or curate, having knowledge thereof, shall resort unto him or her (if the disease be not known or probably suspected to be infectious), to instruct and comfort them in their distress, according to the order of the communion book if he be no preacher, or if he be a preacher then as he shall think most needful and convenient.

And by the *rubric* before the office for the visitation of the sick: When any person is sick, notice shall be given thereof to the minister of the parish; who shall go to the sick person's house, and use the office there appointed.

And the minister shall examine the sick person whether he [344]
repent him truly of his sins, and be in charity with all the world; exhorting him to forgive, from the bottom of his heart, all persons that have offended him; and if he hath offended any other, to ask them forgiveness; and where he hath done injury or wrong to any man, that he make amends to the uttermost of his power. And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts, what he oweth, and what is owing to him, for the better discharge of his conscience, and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates, whilst they are in health.

And the minister should not omit earnestly to move such sick persons as are of ability, to be liberal to the poor.

II. *Communion of the sick.*

By a constitution of archbishop *Peccham*: the sacrament of the eucharist shall be carried with due reverence to the sick, the priest having on at least a surplice and stole, with a light carried before him in a lantern with a bell: that the people may be excited with due reverence; who by the minister's discretion shall be taught to prostrate themselves, or at least to make humble adoration, wheresoever the king of glory shall happen to be carried under the cover of bread. *Lind.* 249.

But by the rubric of the 2 *Ed.* 6. it was ordered, that there

shall be no elevation of the host, or showing the sacrament to the people.

By the present rubric, before the office for the communion of the sick, it is ordered as follows: Forasmuch as all mortal men be subject to many sudden perils, diseases, and sicknesses, and ever uncertain what time they shall depart out of this life; therefore to the intent they may be always in a readiness to die whensoever it shall please Almighty God to call them, curates shall diligently from time to time (but especially in the time of pestilence or other infectious sickness) exhort their parishioners to the often receiving of the holy communion of the body and blood of our Saviour Christ, when it shall be publicly administered in the church; that so doing, they may, in case of sudden visitation, have the less cause to be disquieted for lack of the same. But if the sick person be not able to come to the church, and yet is desirous to receive the communion in his house; then he must
[345] give timely notice to the curate, signifying also how many there are to communicate with him (which shall be three, or two at the least;) and having a convenient place in the sick man's house, with all things necessary so prepared that the curate may reverently minister, he shall there celebrate the holy communion.

But if a man, either by reason of extremity of sickness, or for want of warning in due time to the curate, or for lack of company to receive with him, or by any other just impediment, do not receive the sacrament of Christ's body and blood; the curate shall instruct him, that if he do truly repent him of his sins, and stedfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption; earnestly remembering the benefits he hath thereby, and giving him hearty thanks therefore; he doth eat and drink the body and blood of our Saviour Christ, profitably to his soul's health, although he do not receive the sacrament with his mouth.

In the time of the plague, sweat, or other such like contagious times of sickness or diseases, when none of the parish can be gotten to communicate with the sick in their houses, for fear of the infection; upon special request of the diseased, the minister may only communicate with him.

III. *Departing out of this life.*

Can. 67. When any is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more but one short peal, and one other before the burial, and one other after the burial.

And this tolling of the bell seemeth to have been originally

founded on the doctrine of masses satisfactory, or prayers for the dead; that every person upon hearing of the bell, should apply himself to prayer for the soul of the person departing, or departed out of this life.

And the alms usually given at funerals seemeth to have been intended for the like purpose.

Sidesmen. See Churchwardens.

Simony. [346]

SIMONY hath its name from *Simon Magus*, who thought to have purchased the gift of the Holy Ghost for money. 3 *Inst.* 153. (1)

Simoniacus is he who maketh a corrupt contract; and *simoniace promotus* is he who is promoted upon such contract, although he was not privy to it himself.

I. *Simony by the canon law.*

II. *By statute.*

I. *Simony by the canon law.*

1. *Langton.* We strictly forbid any man to resign his church, and then accept the vicarage of the same church from his own substitute; because in this case some unlawful bargain may be well suspected. And if any shall presume to do contrary hereunto, the one shall be deprived of his vicarage, and the other of his parsonage. *Lind.* 107.

It may seem strange, that any one should chuse to be vicar rather than rector; but as there might in some particular cases be other reasons for it, so there was one very apparent reason, *viz.* that the Lateran council under Innocent the third, had forbidden the holding two churches, that is, two rectories, but not two vicarages, or a rectory and a vicarage. For though the Lateran canon against pluralities was not yet put in execution here; yet the clergy were apprehensive that this would soon be done. *Johns. Langt.*

2. *Wethershead.* It shall not be lawful to any man to transfer a church to another *in the name of a portion*, or take any money

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(1) Simony is *voluntas emendi vel vendendi spiritualia aut spiritualibus annexa. Baker* v. *Rogers, Cro. El.* 789. As if a bishop takes above the fees allowed for granting orders, institution, &c. *Bishop of St. David's* v. *Lucy, Carthew,* 485. see generally 1 *Inst.* 17 *b.* 3 *Inst.* 153. The ecclesiastical courts have jurisdiction to try questions of simony. *Dobie* v. *Masters,* 3 *Phill. R.* 171.

or covenanted gain for the presentation of any one: And if any should be found guilty hereof by conviction or confession; *we do decree by the king's authority* and by our own, that *he shall for ever be deprived of the patronage* of that church. *Lind.* 281.

In the name of a portion] That is, as a portion from a father or grandfather, to his son or grandson. *Johns. Wether.*

We do decree by the king's authority] *Lindwood* says, that *de facto* the king of England hath cognizance in causes of the right of patronage; which this constitution takes notice of as such; although he says, the contrary is true by the canon law. *Lind.* 281.

[347] *Shall for ever be deprived of the patronage*] Which seemeth to be intended, during his life; and not to extend to his heirs after him; so as to punish them for their father's or other ancestor's crime. *Lind.* 281.

And Sir *Simon Degge* observes upon this, that a canon is not sufficient to deprive a man of his freehold or inheritance; and this canon (he says) was never put in execution, or attempted so to be, so far as he can find. *Deg. p.* 1. *c.* 5.

3. *Othobon.* Whereas we understand that it frequently happeneth, that when a presentation is to be made to a vacant church, he who is to be presented first maketh a bargain with the patron for a certain sum to be paid to him yearly out of the profits of the church, and he who hath made such contract is presented to the church; we, intending to provide against this act of simony and detriment to the church, do utterly revoke all pensions heretofore imposed on parish churches, unless they who have or receive the same, are warranted from the beginning by lawful prescription or special privilege, or other certain right. *Athon.* 135.

Neither was this canon, (saith Sir *Simon Degge*) of better effect than the other, as to the making contracts void, which were only determinable at the common law, where this canon could not be pleaded in bar. *Deg. p.* 1. *c.* 5.

But there were some general canons (he says) of the church of greater force, whereby a person simoniacally promoted is punished by deprivation, and a simoniac by deprivation and perpetual disability, not only as to the church he was presented to upon a simoniacal contract, but also as to all others. *Deg. p.* 1. *c.* 5. (*a*)

4. Simony is the more odious (lord *Coke* says) because it is ever accompanied with perjury; for the presentee is sworn to commit no simony. 3 *Inst.* 156.

Thus by a canon of archbishop Langton, it is ordained as followeth: We do decree, that the *bishop* shall take an oath of him

(*a*) See Advowson, 4. & 5. and Deprivation in the note.

who shall be presented, that for such presentation *he neither promised nor gave* any thing *to the person presenting him*, nor made any agreement with him for the same: especially if he who is presented be probably suspected of the same. *Lind.* 108.

Bishop] Or other ordinary who hath power to grant institution. *Lind.* 108.

He neither promised] By word or other stipulation. *Lind.* 108. [348]

Nor gave] Either by exchange, or recompence, or confirmation of what had been given before, or by bequest, or remission. *Lind.* 109.

To the person presenting him] And if he promise any thing to another, although it be not to him who hath the presentation: yet if it be so that he shall not otherwise have the benefice, this also is simony. *Lind.* 109.

And by Can. 40. To avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities, and livings, is execrable before God; therefore the archbishop and all and every bishop or bishops, or any other person or persons having authority to admit, institute, collate, instal, or to confirm the election of any archbishop, bishop, or other person or persons to any spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure, or without cure, or to any ecclesiastical living whatsoever, shall, before every such admission, institution, collation, installation, or confirmation of election respectively, minister to every person hereafter to be admitted, instituted, collated, installed, or confirmed in or to any archbishopric, bishopric, or other spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice, with cure or without cure, or in or to any ecclesiastical living whatsoever, this oath in manner and form following, the same to be taken by every one whom it concerneth, in his own person, and not by a proctor: "*I* N. N. *do swear, that I have made no simoniacal payment, contract or promise, directly or indirectly, by myself, or by any other to my knowledge or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or living;*" [respectively and particularly naming the same, whereunto he is to be admitted, instituted, collated, installed, or confirmed;] "*nor will at any time hereafter perform or satisfy any such kind of payment, contract or promise made by any other without my knowledge or consent: So help me God through Jesus Christ.*"

And this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths, or the notions of the catholic church concerning simony, is against *all* promises whatsoever. *Gibs.* 802.

Therefore though a person comes not within the statute of the 31 *El.* hereafter following, by promising *money, reward, gift,*
[349] *profit, or benefit;* yet he becomes guilty of perjury, if he takes this oath, after any promise of what kind soever. *Id.*

Dr. Watson queries whether the oath against simony be not abolished with the oath *ex officio:* But Mr. Johnson says, he may as well query the oaths of allegiance and supremacy; for that a clerk is no more obliged to accuse or purge himself of simony by the one, than of rebellion or popery by the other. *Wats. c.* 15. *Johns.* 73.

Which latter opinion is agreeable to the general practice and allowance, especially as the makers of the statute which repealeth the oath *ex officio,* do not seem to have had any thought or intention of touching upon this oath against simony (*b*); albeit the reason here alleged may of itself perhaps not be sufficient, for the oaths of allegiance and supremacy are enjoined by statutes subsequent to that which abolished the oath *ex officio.*

Which statute abolishing the oath *ex officio,* is as followeth; *viz.* It shall not be lawful for any archbishop, bishop, vicar general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or any other person having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer unto any person whatsoever, the oath usually called the oath *ex officio,* or any other oath whereby such person to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing, whereby he or she may be liable to censure or punishment: any thing in this statute, or any other law, custom, or usage heretofore to the contrary in any wise notwithstanding. 13 *C.* 2. *c.* 12. § 4.

In the case of *K.* and *Lewis, M.* 4 *G.* an information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it, till he had been convicted of the simony. *Str.* 70.

II. *By Statute.* (2)

1. By the 31 *Eliz. c.* 6. § 4. "*For the avoiding of simony* "and corruption in presentations, collations, and *donations,* of

(*b*) 4 *Bac. Ab.* 475. *Acc.*

(2) Simony was not punishable criminally at common law. *Moor.* 564. It being thought sufficient to leave the *clerk* to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts have been made to restrain it by means of civil forfeitures.

"and to benefices, dignities, prebends, and other livings, and "promotions ecclesiastical, and in admissions, institutions and "inductions to the same."

It is enacted, that *if any person or persons*, bodies politic and [350] corporate, shall or do, for any sum of money, reward, gift, profit, or *benefit directly or indirectly* or for or by reason of any promise, agreement, grant, *bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever*, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, *shall be utterly void, frustrate, and of none effect in law: And it shall be lawful for the queen, her heirs and successors, to present, collate unto, or give or bestow, every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only: And* all and *every person* or persons, bodies politic and corporate, that shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or *that shall take or make any such promise*, grant, bond, covenant, or other assurance, *shall forfeit and lose the double value of one year's profit* of every such benefice, dignity, prebend, and living ecclesiastical: *And the person so corruptly taking, procuring, seeking, or accepting* any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth *be adjudged a disabled person* (3) *in law to have or enjoy the same benefice*, dignity, prebend, or living ecclesiastical. § 5.

And if any person shall for any sum of money, reward, gift, profit, or commodity whatsoever, directly or indirectly (other than for usual and lawful fees) or for or by reason of any promise, agreement, grant, covenant, bond, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, *admit, institute, instal, induct*, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other ecclesiastical living; every such person so offending shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and thereupon *immediately from and after the investing, installation or induction* thereof had, the same benefice, dignity, prebend, and living ecclesiastical shall be eftsoons merely void; and the patron or person to whom the advowson, gift, presentation, or collation shall by law appertain, shall and may by virtue

(3) And the king cannot dispense with such disability, if the clerk is cognizant of the corrupt contract. See 3 *Inst.* 153, 4. *Winchcomb* v. *Pulleston, Hobart.* 165. and infra *in notis.*

of this act present or collate unto, give and dispose of the same benefice, dignity, prebend, or living ecclesiastical, in such sort, to all intents and purposes, as if the party so admitted, instituted, installed, invested, inducted, or placed, had been or were naturally dead. § 6.

Provided, that no title to confer or present by lapse, shall accrue upon any voidance mentioned in this act, but after six
[351] months next after notice given of such voidance, by the ordinary to the patron. § 7.

And if any incumbent of any benefice with cure of souls shall *corruptly resign* (4) or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or benefice whatsoever; as well the giver as the taker of any such pension, sum of money, or other benefice corruptly, shall lose double the value of the sum so given, taken, or had; the one moiety as well thereof, as of the forfeiture of the double value of one year's profit before mentioned, to be to the queen, and the other to him that will sue for the same in any of her majesty's courts of record. § 8.

Provided always, that this act or any thing therein contained, *shall not in any wise extend to take away or restrain any punishment, pain, or penalty limited, prescribed, or inflicted by the laws ecclesiastical*, for any the offences before in this act mentioned; but that the same shall remain in force, and may be put in due execution, as it might be before the making of this act: this act or any thing therein contained to the contrary thereof in anywise notwithstanding. § 9.

And moreover, *if any person shall receive or take any money, fee, or reward, or any other profit directly or indirectly*, or shall take any promise, agreement, covenant, bond, or other assurance to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), *for or to procure the ordaining or making of any minister, or giving of any orders* (5), or licence to preach; he shall for every such offence

(4) Any resignation or exchange for money is corrupt, however apparently fair the transaction; as, where a father wishing that his son in orders should be employed in the duties of his profession, agreed to secure by bond the payment of an annuity, exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son. This resignation is corrupt and simoniacal; and the bond is void. *Young* v. *Jones*, E.T. 1782. *Chr.* note (8) to 4 *Blk. Comm.* 62.

(5) A bond was given by a father to secure an annuity to his son, till he should be in possession of a living of a certain value, and an agreement of even date was executed, reciting the bond, and declaring that the son would forthwith enter into orders, and accept such

forfeit the sum of 40*l.*: and the party so corruptly ordained or made minister, or taking orders, shall forfeit the sum of 10*l.*: And if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept or take any benefice, living, or promotion ecclesiastical; then immediately from and after the induction, investing, or installation thereof or thereunto had, the same shall be eftsoons merely void; and the patron shall present, collate unto, give, and dispose of the same, as if the party so inducted, invested, or installed, had been naturally dead: the one moiety of all which forfeitures shall be to the queen, and the other to him that will sue in any of her majesty's courts of record. § 10.

§ 4. *For avoiding of simony*] Almost all the authors who have treated of this subject, and even the learned judges in delivering their resolutions in cases of simony, have asserted that there is no word of *simony* in this act; and from thence a conclusion had been drawn in favour of the ecclesiastical jurisdiction, that the temporal courts have nothing to do with simony as such, or to define what shall be deemed simony and what not, but only to take cognizance of the particular corrupt contracts therein specified. Which consequence, although deducible perhaps from other premises, yet doth not follow from the aforesaid observation; for it is plain here is the word *simony:* and the mistake seemeth to have happened from this short preamble being inadvertently printed at the end of the foregoing section, treating entirely of a different subject; so as to have been overlooked by the first person who made the observation, whom others have followed without examination. [352]

Donations] For the like reason only (as it seemeth) a doubt was made in the case of *Bawderock* and *Mackallar*, *M.* 2 *Car.* whether this statute extendeth to donatives. *Cro. Car.* 330.

§ 5. *If any person or persons*] If one who hath no right, present by usurpation, and doth it by reason of any corrupt contract or agreement; that presentation and the induction thereupon are hereby void; for this statute extends to all patrons, as well by wrong as by right. In like manner, [as well at common law as by the statute,] if when a church is void, the void turn is pur-

living. The chancellor expressed great doubts as to the validity of this bond, connected as it was with a corrupt agreement for taking orders. The policy of the ecclesiastical constitution of this country requires that a man should take orders without reference to pecuniary considerations. This case, however, was decided on the ground that the son had not complied with the condition, having received the annuity for 9 years, and being still only in deacon's orders; and that therefore the annuity was determinable by the father or his representatives. *Kirkcudbright* v. *Kirkcudbright*, 8 *Ves.* 53.

chased (6); although the grant of a void turn, as being a thing in action, is of itself void, and the purchaser's presentee comes in *quasi per usurpationem;* yet because it is by means of a simoniacal contract, it is as much simony as if the grant had not been void. 1 *Inst.* 120. 3 *Inst.* 153. *Cro. Eliz.* 789. (7)

And it is to be observed, that this clause is general, "If *any* person or persons," and doth make no allowance in the case of father and son, more than in the case of other persons; and that therefore the notion that a purchase of the next avoidance *when the incumbent is sick and ready to die* (8), and the son's privity to that purchase, is less simony in the case of a son than it would be in the case of any other person, hath no foundation in the act. Neither is the reason that a father is bound by nature to provide for his son good to the aforesaid purpose; for a man is bound by nature also to provide for himself, and so might as well purchase for himself. *Wats. c.* 5. *Gibs.* 798. (*c*)

[353] So if a father, in consideration of a clerk's marrying his

(6) So the sale of an advowson, the church being void, is void at common law, per lord Hardwick in *Grey* v *Hesketh*, *Ambl.* 268., and see *Benloe*, 192. *Bishop of Lincoln* v. *Wolferstan*, 1 *Bla. R.* 490. 2 *Wils.* 174. 3 *Burr.* 1512. If the patron sells the fee simple of the advowson after the avoidance, neither he nor his vendee can have a *quare impedit;* because the avoidance makes it a chose in action, so that it does not pass to the grantee, and the grantor has destroyed his action by his conveyance: so none can have it. *Leak* v. *Coventry*, (Bishop), *Cro. El.* 611.

If a presentation be made by a person usurping the right of patronage, and pending an action for removing his clerk who is afterwards removed, the benefice is sold, this is simony within the statute, for the church was never full of that clerk; and if this were allowed, the statute might be eluded, for it would be only getting an usurper to present, while the church was void, and *then* selling it. *Walker* v. *Hammersley*, *Skinn.* 90.; but the rightful patron shall have the presentation and not the king. 3 *Inst.* 153.

(7) *Baker* v. *Rogers*, *Moor.* 114. S. C. *Stephens* v. *Wall*, *Dyer*, 282 *b*. *Jenk. Cent.* 6. *Case* 13. *Calvert* v. *Parkinson*, *Noy.* 25. *Lane*, 72. *Winchcomb* v. *Pulleston*, *Hob.* 165.

(8) The purchase of the *next presentation* to a living, the church being full, is good by modern practice, when not prevented by 12 *Ann.* c. 12. (*infra*, 370.) But it seems that such a purchase, where the incumbent is in a dying state, is simony. *Smith* v. *Shelbourn*, *Cro. El.* 685. *Hobart*, 165. *Moor*, 916. 19 *Vin. Ab.* 458. *Winn.* 63, *acc.* In *Barret* v. *Glubb*, 2 *Bla. Rep.* 1052, the purchase of an *advowson in fee simple* under these circumstances, but without privity of the clerk, was held not affected by the statute of simony. *Eyre C. J.* declaring that it would be otherwise had it been a purchase of the *next presentation*, which, as a 'corrupt agreement to present,' was within the statute, while a 'corrupt presentation' was bad at common law; and see *Paley's Philosophy*, B. III. *c.* 20.

(*c*) See 2 *Bla. Com.* 280.

daughter, doth covenant with the clerk's father, that he will procure the clerk to be presented, admitted, instituted, and inducted into such a church upon the next avoidance thereof; this is a simoniacal contract. *Wats. c.* 5. (*d*)

Directly or indirectly] Simony may be committed, and yet neither the patron nor incumbent be privy to it, or knowing of it. Thus in a writ of error to reverse a judgment, whereby the king had recovered in a *quare impedit* upon a title of simony, which was, that a friend of the patron had agreed to give so much money to one (who was not the patron), to procure the said parson to be presented, who was presented according to that agreement; it was assigned for error, that it did not appear, that either patron or parson were knowing of this agreement. But by the court, the parson is simoniacally promoted; and a case was mentioned, where the parson of St. Clement's was ousted, by reason that a friend had given money to a page belonging to the earl of Exeter, to endeavour to procure the presentation, and neither the earl nor the parson knew any thing of it. *Wats. c.* 5. (*e*) [So if the friend promises without privity of the clerk, that he shall afterwards make a lease of tithes to the patron, which he afterwards does.] (9)

Bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit or benefit (1) *whatsoever*] The bond and assur-

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(*d*) *Litt. Rep.* 177. Otherwise if the covenant is independent of the consideration. *Byrte* v. *Manning*, *Cro. Car.* 425. 191.

(*e*) *Rex* v. *Trussell*, 1 *Siderf.* 329. 2 *Keb.* 204. [and *Hutchinson's* case, 12 *Rep.* 101. *id.* 74. 3 *Inst.* 154. *Baker* v. *Rogers*, *Cro. El.* 789. 1 *Brownl.* 153. *Lutw.* 1087. 1090. 1093. *The King* v. *Bp. of Norwich and Others*, 3 *Lev.* 337. *Semb. aliter* as to advowsons in fee. See *Barret* v. *Glubb*, infra 352. *n.* 8.; and the presentee, if ignorant of the corruption, is not within the clause of disability (§ 5.) in that statute. 3 *Inst.* 154.]

(9) See note (*e*) between [ ], and see *Com. D.* tit. *Esglise.* (N. 3.)

(1) A reservation of a profit to a stranger as an annuity to the widow or son of the last incumbent, does not appear to be within the stat. 31 *Eliz.*, though Dr. Watson doubts it; but it is perfectly clear that a reservation of any kind of profit in favor of the patron, is within the statute, *Baker* v. *Mounford*, *Noy. Rep.* 142.

A local act for inclosure of lands, recited a doubt whether the curate, (who was in this case *qua* vicar,) was entitled to small tithes thereof, or to a *modus* in lieu. A posterior agreement is executed by a new curate and the inhabitants, whereby a money payment in lieu of such tithes is declared to be and to have been charged *from time immemorial* in right of such church. This agreement entered into to restrain the then curate from asserting his claim to the small tithes by due course of law, and to furnish evidence against his successors, is a *benefit* to the inhabitants and simoniacal, and the presentation lapses to the crown. *The King* v. *Bp. of Oxford*, 7 *East*, 600.

ance here mentioned, being for money, reward, gift, *profit*, or *benefit*, a way was found very early to defeat the intention of this act, by *general bonds of resignation*, whereby the presentee obliged himself to resign and void the benefice, within a certain time after warning to be given to him, or else indefinitely, whenever the patron should require it. *Gibs.* 799, 800.

And these bonds have been allowed both in law and equity. (2) Thus in the case of *Peele* v. *the Earl of Carlisle*, *M.* 6 *G.* In the king's bench: In an action of debt upon a bond, conditioned to resign a benefice; the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in a court of equity; and that also, where the condition is general, and not barely to resign to a particular person. *Str.* 227.

[354] So, *M.* 9 *G.* In chancery. *Peele* v. *Capel.* Capel on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that Peele should continue to hold the living, paying 30*l.* a-year to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit. And then Peele comes into this court for an injunction, and to have back his 30*l.* a-year. On hearing the lord chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on *account of the ill use that had been made of it* (3): and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it. *Str.* 534.

So, in *Durston* v. *Sandys*, *M.* 1686. The defendant upon his presenting the plaintiff to a parsonage, took a bond of him to resign; which (as the reporter says) though in itself lawful, yet the patron making an ill use of it, *viz.* to prevent the incumbent from demanding tithes in kind, the court awarded a perpetual injunction against the bond. 1 *Vern.* 411.

And *Hesket* v. *Grey*, in K. B. *H.* 28 *G.* 2. (which was a case out

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(2) Though never approved by the bishops. See *Babington* v. *Wood*, *Cro. Car.* 180. See the cases in which they have been allowed before collected. *Bp. of London* v. *Ffytche*. *Com. Dig.* tit. *Esglise.* (N. 3.)

(3) See 365. note (*a*). Such bonds though to resign generally are good, and have been constantly so allowed, because they may be on good and valuable considerations, and not simoniacal; as where the party took a second benefice or for non-residence; and equity will insist on such bonds where the consideration is good; see *Turner* v. *Hawkins*, *Fortesc. Rep.* 351.; and will only grant an injunction where they are made use of to extort money from the incumbent, or to turn him out for any thing but ill behaviour or immorality. *Hawkins* v. *Turner*, *Prec. Ch.* 513. See also *Hilliard* v. *Stapleton*, infra, note.

of chancery: — Debt upon a bond,) Upon oyer of the condition it appeared that the obligor had been presented to the living of Staining by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the expiration of five years, at the request of the plaintiff, his heirs or assigns, or upon proper notice in writing, so that a new presentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary the said living, so as that the same might become void, then the obligation to be void. The defendant pleaded, that he did offer to resign absolutely the living, and that he delivered the resignation to the ordinary that he might accept the same, and the plaintiff make a new presentation, but that the ordinary refused to accept it. He pleaded further, that the agreement was corrupt; and that the bond was taken to keep the defendant in awe, and therefore also corrupt and void. *Ryder* chief justice delivered the resolution of the court: The averring in the plea, that the agreement was corrupt, will not make it so: but it should be set forth what sort of corruption, that the court may judge whether simoniacal or not. As to the point, whether a general [355] bond of resignation is good, we are all of opinion it is. It was determined in the case of lord *Carlisle* and *Peele*. But every simoniacal contract is void, where it is secured only by promise. Otherwise it is, when a bond is given for the performance of such a contract, when the condition does not express the agreement, but is only a condition for payment of money, because we cannot go out of the written condition to vacate the obligation, and also because a specialty does not want a consideration to support it, as a promise depending only upon simple contract does. It has been objected, that these kinds of bonds, when the contract appears upon the face of the condition to be for a general resignation upon request, are void: indeed it does look so; but the law is otherwise. And as to the other objection, we are all of opinion that the plea in bar is bad, because it is not averred that the bishop has accepted this resignation, and for these reasons: 1. Because without the acceptance of the ordinary, the resignation is not complete, and the patron can have no benefit of such a resignation. 2. Because the defendant has undertaken for the acceptance of the bishop, as that is necessary to make a complete resignation, which he has by the condition of his bond agreed to do. 3. Because the plea does not contain a sufficient excuse for the bishop's non-acceptance of the resignation; for the defendant has undertaken that the bishop shall do it, or if he does not, he will make a satisfaction by paying money or the like to the party who is injured thereby; and this is reasonable, and is the law in such cases, when the obligor undertakes for the act of a stranger. The ordinary is a judicial officer, and

is intrusted with a judicial power to accept or refuse resignations as he thinks proper. And judgment was given for the plaintiff. (4)

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(4) *Grey* afterwards applied to the court of chancery for an injunction; the proceedings on which application are thus reported in *Grey* v. *Hesketh, Ambler*, 268. Plaintiff was presented to the living of *Steyning* by the defendant, and previous thereto gave a general bond of resignation after the end of six years, on three months request: action sued at law, and judgment recovered on the bond. Bill by plaintiff for an injunction, and *inter alia* for a discovery, whether defendant had not sold the advowson since the end of the six years, with a promise of procuring an immediate resignation. Defendant demurred to the discovery as tending to subject him to the penalties of the statute against simony. Lord *Hardwicke* Ch. was of opinion that the sale of an advowson during a vacancy is not within the statute of simony as sale of the next presentation is (see *Baker* v. *Rogers*, *Cro. Eliz.* 788. *Moore*, 914.); but it is *void* by the common law. These sorts of bonds are held good at law, and so they are in equity, unless an ill use *is attempted to be made of them, viz.*, by extorting a composition for tithes, procuring an annuity for his relation, or demanding a resignation wantonly, or without good cause, such as is approved by the law; as for the benefit of his own son, or on account of non-residence, plurality, or gross immorality of the incumbent, 2 *Bl. Comm.* 280. and *authorities* passim *in this title;* in which case this court will interfere. *Durston* v. *Sandys*, 1 *Vernon*, 411. and *Hilliard* v. *Stapleton*, infra. *Moor.* 641. *Cro. Car.* 680. *acc.* The question then is, whether the sale of his advowson under these circumstances, attended with an immediate resignation, is an abuse? It seems to be an evasion of the statute; perhaps if more money had been given by reason of the vacancy, it might be within the statute. It desires discovery; and he overruled the demurrer. It was suggested in the bill, and made a defence at law, that the bishop had refused to accept the resignation. His lordship approved the conduct of the bishop, in case he was informed the advowson was sold to be attended with an immediate resignation. And he also expressed himself of the same opinion with the judges in the king's bench, that the bishop's refusal to accept the resignation was no excuse for the incumbent's not resigning; for that he had undertaken to resign, which implies both resignation and acceptance, without which the resignation is not complete. *Lamb's* case, 5 *Rep.* 23. *Hilliard* v. *Stapleton*, 1701., 1 *Eq.-Ab.* 87. *pl.* 3. The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs; the patron died an infant, leaving two sisters, his heirs, who, on the incumbent's refusal to resign, put the bond in suit, and recovered judgment. Upon a bill to be relieved against the judgment, it was proved that the sisters had said, "If he would not give 700*l.* for the perpetual advowson, they would make him resign." Held, that the proof in this case lying on the defendants, unless they show some good reason for removing the incumbent, the court will decree against the bond. Bonds for resignation have been held good in law. The statute 31 *El.* against simony, made the penalty on the lay patron; and no case of

But it appearing that the patron had advertised the living to be sold, and in treating with a purchaser for it, that he had declared he asked and expected a greater price for it, as he could compel an immediate resignation: lord *Hardwicke*, for this rea- [356]

a *resignation bond* appears before that statute, since which they *have been allowed only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence or a vicious course of life;* (see *Bagshaw* v. *Bossley*, 4 *T. R.* 78.) *but if any other advantage be made, it will avoid the bond;* and the court will grant a perpetual injunction against it. Though it be general for resignation, yet some special reason must be shown to require such resignation, or the court will not suffer it to be put in suit; for if it should not be so, simony may be committed without proof or punishment. A particular agreement to resign for the benefit of the friend that would be presented, must be proved, and without such agreement the bond ought not to be sued but for misbehaviour of the parson.

In this case there being proof of endeavours to get money out of plaintiff (see *Hawkins* v. *Turner*) the court decreed a perpetual injunction against the bond, and satisfaction to be acknowledged on the judgment, and plaintiff to give a new bond to resign: but that not to be sued without leave of the court. In *Grey* v. *Hesketh*, *Ambl.* 268., Lord *Hardwicke* said, 'The lord-keeper Wright went too far in this case.'

Again in *Legh* v. *Lewis*, *May* 5. 1801. 1 *East*, 391. The court held that a bond given to resign a school or freehold office at request of the patron is valid, but equity will interfere by injunction to prevent an ill use of it by the patron: as in 1 *Vern.* 411., &c. *sed quære*, 3 *B.* & *P.* 231. S. C. in error, and lord *Thurlow* in *Bp. of London* v. *Ffytche*. In *Grahame* v. *Grahame*, A. D. 1682. 1 *Vern. Rep.* 131., on motion to dissolve an injunction against proceeding at law on a resignation bond, *North* C. J. doubting its validity, directed plaintiff to declare at law and defendant to plead simony, and after judgment to return into equity. As to protecting a party and his executors from answering a bill of discovery, where the answer might subject him to forfeiture for simony, see *Parkhurst* v. *Lowten*, 1 *Meriv.* 391.

A. presented B. to a vicarage, and took a bond conditioned to resign after ten years on request. The ten years expired, and the request was made. B. prepared a resignation and tendered it to the bishop, who refused to accept it, saying these bonds were against conscience and void, and because this, in an action on the bond, would be no plea (see *Grey* v. *Hesketh*, *Ambl.* 268. *Peele* v. *Earl of Carlisle*, *Stra.* 227.). B. (who held the benefice for a third person of good conversation, but did not reside at the vicarage,) brought his bill to be relieved, and to have an injunction against the bond at law. But the court would not relieve, unless the patron had made *some ill use* of the bond, for the law allows resignation bonds to be good. *Price* B. was not clear as to any judicial act to be done by a third person, but the party having done his endeavour, the parson had three months given him to resign, which if he did the court would grant a special injunction. *Steeper* v. *Carver*, 2 *Eq. Ab.* 183, *pl.* 1.

son, and as it was making a bad use of the patron, granted an injunction to restrain the patron from proceeding further upon the bond.

In the case of the bishop of *London* and *Lewis Disney Ffytche* esquire, in the year 1780 (5), the rectory of the parish church of *Woodham Walter* in *Essex*, in the diocese of *London*, becoming vacant, Mr. *Ffytche* presented his clerk the reverend *John Eyre* to the bishop for institution. The bishop being informed, that the said John Eyre had given his patron a bond in a large penalty to resign the said rectory at any time upon his request, and the said John Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living.

Whereupon Mr. *Ffytche* brought a *quare impedit* (g) against the bishop in the court of common pleas, and obtained judgment 7] against him. Upon which, the bishop appealed to the court of king's bench, and that court also gave judgment in affirmance of the judgment in the court of common pleas. Upon this, the bishop appealed to the house of lords; where, upon debate, the lords ordered several questions to be put to the judges; who differing in opinion, they were directed to deliver their opinions seriatim, with their reasons. The questions were twelve in number, but divers of them going only to matter of form, the true substantial inquiry was, whether an agreement made between an incumbent and patron, whereby the incumbent undertakes to avoid the benefice, at the request of the patron, be not an agreement for a *benefit* to the said patron, within the statute of 31 *Eliz.* so as by reason of such agreement such presentation shall be void?

Mr. Justice *Buller* said, he had taken no small pains to find out upon what principle all the cases have gone, but it had not been with much effect: for he could not find that the different authorities upon this subject are supported by that sense, by that reason, or by that principle, which, if the case were now totally new, would govern him in his judgment, or induce him to concur in those decisions. But the authorities are so very numerous; they have arisen at so many different periods of time; all the judges for near 200 years past have been so uniformly of the same opinion; the law has been received not only in Westmin-

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(5) Reported 1 *East*, 486. 2 *Bro. P. C.* 211. 1 *Bro. C. C.* 96. *Cunningham's Law of Simony.*

(g) Upon this *quare impedit* the bishop filed a bill to discover whether the clerk presented to him by Mr. *Ffytche* had not given a general bond of resignation, in order to set up that bond as a defence at law for having refused him institution. To this bill the defendant demurred, first, on account of the legality of such bond; secondly, that the discovery was immaterial; but the demurrer was over-ruled. 1 *Bro. C. C.* 96. [and see *Parkhurst* v. *Lowten*, 1 *Meriv.* 391.]

ster-hall, but throughout the kingdom, as properly settled, and mankind have so uniformly acted upon this idea, that it seemed to him to be very dangerous to overturn, or even to shake those authorities; For if policy, private wishes, or the hardships of a case were permitted to weigh down judicial determinations in one instance, they might be extended to any other; and the law, instead of being a certain rule, would be governed by a discretion to be exercised without rule in each particular case which comes in judgment. The bond in question is a bond with a condition to resign upon request; and it is stated in the pleadings that it was corruptly agreed between Mr. Eyre and Mr. Ffytche, that [358] Mr. Ffytche should present Mr. Eyre, and in consequence thereof, Mr. Eyre did give this bond to Mr. Ffytche. The question is, whether such a bond be corrupt and illegal? The authorities one and all have determined that such a bond is good; And this hath been decided not only in cases where it might be supposed that the bond was given *after* the presentation, and without any *previous* agreement, but in cases where it did appear that the bond was given *before* the presentation, and that a presentation was made in consideration of that bond.

Mr. Baron *Eyre*. The counsel for Mr. Ffytche rested the whole argument upon the authority of a series of cases, in which it was said to have been adjudged that these bonds were good in law; the house was called upon *stare super antiquas vias*, and an indignation endeavoured to be raised against all those who should unsettle foundations. But without unsettling foundations, he might ask (he said) how the general doctrine, extracted from this series of cases, that a general bond of resignation is in itself not unlawful, applies even to prove that the bond stated in these pleadings, under the special circumstances of this case, is not unlawful: And he was compelled to go into the inquiry: because the question upon these bonds, proposed by their lordships, was not any question upon the validity of such bonds themselves, but was a question upon their validity upon the particular case, and under special circumstances stated in these pleadings. He had looked, he said, into most of the cases that have been alluded to, and found that instead of deciding the question upon the validity of such a bond, given under such circumstances as are disclosed in these pleadings, they are express authorities to prove that such a question remains to this hour open to discussion. From the uniform language of the cases, if you object to the validity of these bonds, you must take the circumstances upon which the objection is founded, that the court may judge whether it is sufficient. Therefore at once to distinguish this case from all the cases cited, he believed he might hazard the assertion, *viz.* that all the circumstances were stated for the first time upon this record. Laying these, therefore, out of the case, the questions proposed

to the judges are by no means complicated or intangled. The statute of Elizabeth was made to inforce a very clear rule in the ecclesiastical law, that presentations ought to be spontaneous. The words of the statute are "*reward, gift, profit, or benefit.*"
[359] Is the possession of a resignation bond *profit* or *benefit* to a patron? In every article in which the patronage is valuable, it is marketable, and by that the bond becomes instantly more valuable and more marketable. In a word, he that stipulates for a resignation bond, bargains for a sum of money, or for that which to him is as valuable, or perhaps more valuable than that sum of money. Either of them is *beneficial* to him, both of them, therefore, equally forbidden by the statute.

Mr. Justice *Nares.* It may perhaps be difficult to point out the reasons upon which general bonds of resignation were originally held good. Many reasons may be suggested; among the rest, he mentioned that such a bond was never considered in a criminal point of view, where particular persons, as the sons or relations, or particular friends, were intended to be promoted upon a resignation; he would suppose that the patron, at the time he gave his living to the incumbent, had a great number of children; one perhaps he intended to bring up to the church. They were of that age at that time, he could not tell which it may be that may live to be old enough, or if he lived, how far his capacity might enable him to take upon him that sacred function; and there may be other things to prevent it; and therefore it is impossible to specify what particular child it should be assigned to. If he has in his eye a relation among others, he cannot perhaps point out that particular relation. Or there may be other incidents; the incumbent might go and leave his church for too long a time; therefore resignation bonds may be considered as having some little foundation at the time they were originally entered into. But that such bonds have been held good appears from a regular train of cases in law and equity for near two hundred years. Founded on which decisions, which have so totally settled this point in the temporal courts, Sir Simon Degge takes notice, that bonds of resignation had become so frequent, that hardly a living was possessed without them; that he advises an application to parliament to prevent that bad practice, and which, he believed, if it could be effectually prevented, would be a very desirable thing.

The Bishop of *Salisbury.* The whole of the question rests ultimately on the statute of 31 *Eliz.* The interpretation given to that statute by the learned baron is consonant to the best and most dispassionate opinion I am capable of forming; and which therefore I hold myself bound to deliver to your lordships. It is well known, my lords, that this act was passed with a view of protecting the ecclesiastical law, and of strengthening its weakness.

The ecclesiastical law, which considers simony as a crime of deep dye, could only punish the *clerical* offender. The legislature perceiving the serious consequences of this defect, in its wisdom interposed; and inflicted certain penalties on the patron, the corrupter and partaker of the guilt. The act is not deprivative, but accumulative. It doth not deprive the ecclesiastical judge of his power. It doth not withdraw the clerk from the jurisdiction of his ordinary, nor dispense with the oath against simony, to which every presentee was previously subject. Its main object was to prevent corrupt influence, interested motives, and gross abuse of his power on the part of the patron; and to apply a remedy to an evil, thought to be of the most dangerous frequency, of the most alarming magnitude at that day; which has been continually increasing to the present period; and which, unless checked, bids fair to break down every barrier which honour, decency, and religion can oppose. The question on which your lordships are now to pass judgment, I conceive to be new in specie. It is here, my lords, I mean to make my stand. None of the various cases which have been adduced by the judges in the house, or by the counsel at the bar, seem to me to touch it. They are distinct in their nature; the case has never been decided upon, never been argued, and consequently all the reasoning from a series of determinations in the courts below, so much laboured, and so much pressed, doth not apply, and falls to the ground. Much has been said, my lords, much more probably will be said, as to the inexpediency and fatal effects of moving old foundations. Legal decisions, which for centuries have received the sanction of successive generations, of the great and able interpreters of law which preside in our courts (and greater and abler either in former ages or at the present time, no nation ever had to boast of) are entitled to the highest reverence, from every citizen who respects his own character, values his property, or loves his country. But I contend, my lords, that in the case before you there are no precedents. It is specific in its circumstances; and (exclusive of the bond), on the sole ground of the statute, the presentation in the present case is void. And here, my lords, I should naturally close what I have to offer to your lordships' consideration. But as the situation of the parochial clergy, on the foot of the commonly-received
interpretation of the law relative to general bonds of resignation, [361]
is either unknown or misunderstood, I should be wanting in justice to that most useful and most respectable body of men, were I not to represent it without exaggeration, and leave it to your lordships' honour and humanity. Every presentee, previous to his receiving institution, is obliged to take the oath against simony. The sense of that oath is as clear as language can make it. There never could have been the hesitation of an instant as to its meaning, in the breast of any man, who in interpreting the terms in

which it is expressed, followed nothing but the genuine suggestions of his own understanding. The only question which can arise on the subject is a question of conscience alone; but unhappily, the force of temptation in this as in other instances of moral conduct, operates on minds not sufficiently tender to the impressions of duty; and leads to the fostering a secret wish, that the imposition of the oath could be either dispensed with, or the terms in which it is framed be differently expounded from its obvious import. The surprize of an unexpected offer of a valuable benefice; the oppression of poverty; the calls, perhaps, of a numerous family unprovided for; and the glitter of comparative affluence; all contribute to induce to the listening to any casuistry which can reconcile interest with duty. To a man thus circumstanced, and thus inclined, authority is easily admitted in the place of reasoning, and the sanction of courts supersedes conviction. From these motives, general bonds of resignation have usually been given; and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards the property of every other subject of the state. He ceases to be free; because he holds his living at the absolute will of his patron; subject to his caprice; and rendered incapable of discharging many of the most essential duties of his office, where they happen to clash with the prejudices, the humours, or the vices of the master of his fortune. Nay, my lords, even the most degrading compliances, the sacrifice of every comfort which unconditional presentation confers, are insufficient to secure a permanent continuance in the benefice, the instant that the wants, or even the whim of the patron demand an avoidance: Resignation or ruin is the alternative. Your lordships need not be told which is likely to be submitted to.

Bishop of *Bangor*. I had occasion, many years ago, in the course of my inquiries, to consider the subject of general bonds
[362] of resignation. And I must confess that the decisions, one in the 8 *Ja.* 1. *Jones* and *Lawrence*, the other in the 5 *Ch.* 1. *Babington* and *Wood*, did not appear to me to rest on such solid and substantial grounds as they ought to have done; and yet these two determinations are the precedents, which our courts have ever since implicitly followed, whenever the legality of such bonds was brought into question. One of the learned judges, in the course of his argument, proved to your lordships, that the point now under consideration was not the point in question when these two cases were determined, on which so much stress was laid in the courts below; and it is very material that all the learned judges who have hitherto delivered their opinions to you on this occasion, have unanimously declared, that if this case had been *res integra*, the judgment ought to have been different; but the weight of these precedents, and of many others for so great a length of time,

presses so hard upon them, that they are unwilling to make any alteration, lest they should be considered as removing landmarks, and unsettling principles which had prevailed for near two centuries. Much reverence, my lords, is certainly due to such decisions of our courts as have been uniform and long acquiesced in; but if in succeeding times, great and manifold inconveniences shall be found to arise from persisting in such determinations, and no inconvenience from altering them, the case is too plain for me to tell this house what ought to be done. Under the cover of general bonds of resignation, the worst and most corrupt practices may be carried on. By means of such a bond, a patron may erect a court of justice over his clerk, much superior to that of his ordinary; the ordinary can suspend a clerk from the exercise of his function, and can deprive him of his benefice; but before this can be done, the party must be cited to appear; a charge commonly called a libel must be exhibited against him; a competent time must be allowed for answering the charge; a liberty must be granted for counsel to defend the cause; and after hearing all the proofs, a solemn sentence must be pronounced, from which there lies an appeal: But a patron, with such a bond in his pocket, has a much more compendious way of doing his business; for he can deprive his clerk, without trial, without proof, without sentence. By means of these bonds, patrons can convert benefices, which are by law freeholds for life, into estates for years, for months, or even only for a few days. By means of these bonds, the revenues [363
of that most useful and respectable body, the parochial clergy, are growing less and less every year; and there is little doubt, but that many of the money payments, in lieu of tithes, and which have now obtained the form of a modus, sprang originally from these bonds. By means of these bonds, it is become as easy to sell the next avoidance of a rectory or vicarage as it is to sell any other species of property; and from this circumstance, religion, learning, discipline, and good order suffer very much. It has been common of late years to advertise in the public prints the sale of livings with immediate resignation: but if this judgment should have the sanction of this house, these advertisers would wax bolder, and in a short time inform us of public offices being opened for negociating this kind of traffic.

Bishop of *Llandaff.* The pope, in former ages, was a great encourager of resignations among the clergy of this kingdom, because he obtained a year's income of the benefice upon every avoidance; but neither were the catholic clergy of this country at that time, nor are they (he believed) at this time, fettered by *general bonds* of resignation. In the church of Scotland, this traffic hath not yet polluted the minds of either patrons or ministers; nor is it in use in any protestant church in Christendom, at least not in the same degree in which it is in our own. This practice,

he said, was a sore scandal to the church of England: and he hoped, from the high sense of religion and honour which had accompanied the deliberations of that house, that the time was now come when it would be no longer endured. It is said, that this matter is not now *res integra*; that there have been in the course of above two hundred years many adjudged cases, and that we must of necessity adhere to the precedents. The *stare decisis*, the *stare super antiquas vias*, was a maxim of law sanctified by such length of usage, such weight of authority, that he durst not produce any of the arguments which suggested themselves to his mind in opposition to it; though some of them tended to question its utility, and some of them its justice. It was a maxim, he said, which his hitherto course of studies had not brought him much acquainted with. It is not admitted in philosophy: It is not admitted in divinity; for divines do not allow that there are any infallible interpreters of the Bible, which is *their* statute book; they maintain that fathers, churches, and councils have erred in their interpretations of that book, in their decisions concerning
[364] points of faith; this, as protestants, they ever must maintain, otherwise they cannot justify the principles on which they emancipated themselves from the bondage of the church of Rome. But be it so, let this maxim, as applied to the law, be admitted in its fullest extent, what follows? Nothing in this case, he said, for the plaintiff had averred, and one of the learned judges had been pointed in proving that the case in question was not similar to any one of the cases which had been adjudged in the courts below. But suppose the case of the plaintiff is similar, in all its circumstances, to some one or more of the cases which have been adjudged below; still it will not follow, that the house of lords is to be bound by the precedents of those courts; if it is, the right of appeal is nugatory. If a man thinks that the judgment of those courts is contrary to law, he has a right to come to this house to know whether it be so or not. And this house, in delivering its opinion, doth not make law, but declares what the law is. The courts below interpret a statute one way, this house may see reason to interpret it another, and in that case the constitution hath said, that the courts below mistook the sense of the statute, and that the interpretation which it receives in this house is the right interpretation. Precedents may be obligatory in the courts in which they are established; but their operation should not be extended beyond the limits of those courts. It ought not at least to be extended into the house of lords. If indeed there were any precedents of that house concerning the legality or illegality of general bonds of resignation, those precedents would have deserved weight in the present case, but there is not one precedent of the kind to be met with on their journals; so that whatever might be thought as to the novelty of the case in the courts below,

it was undoubtedly new in that house, free and unshackled by precedent.

Lord *Thurlow* argued at large against the validity of these bonds, and among other particulars observed, that one thing which struck him was, that ever since the establishment of the church of England, this ecclesiastical office was an office *for* life. It is not competent to the bishop to give it for any less time than for life. And it never was competent to a bishop of any European church that ever he heard of, (and he had made inquiries) to give it for any less estate than an estate for life. The incumbent therefore derives intirely under and from the bishop an estate for life, grounded upon the original constitution of the office, and consequently invariable by law. If that be the con- [365] stitution of the office, by what rule or principle can it be justified at common law, that such an officer should give a bond to his patron in order to hold the living for a less term than for life? In the argument of this cause, a question was asked, with respect to a bond given by a *judge* to resign his office of judge: What was the answer? The bond would be given to the king; and if given to the king, it would be void, because it would render the judges dependent upon the king, instead of being independent, as the statute of king William expresses it, *quamdiu se bene gesserint*. A *master in chancery* is an officer appointed for life: Suppose the chancellor has the appointment of it; suppose such master gives a bond to resign when called upon, would that bond be good at common law? No; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law officer; his place is independent, it is whilst he behaves himself well in that office; if he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation such as the law said it should not be? (6) And in the conclusion he moved, that the judgments of the courts of common pleas and king's bench in this cause be reversed. Which was determined accordingly, upon a division, nineteen against eighteen.

N. One of the questions proposed to the judges was, Whether the ordinary is bound to accept a resignation? (*Vide supra*, **Resignation** 5.) (*h*)

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(6) But see *Legh* v. *Lewis*, 1 *East*, 391. *contra*, *Lawrence* J. *dubitante*. See S. C. 3 *B.* & *P.* 231.

(*h*) Since this case a bond given to the patron by an incumbent on presentation to reside on the living, or to resign to the ordinary, if he did not return to it within one month after notice, and also not to commit waste, was adjudged to be good; for the condition was not as in *Ffytche's* case to secure an unqualified resignation, but to enforce

Shall be utterly void, frustrate, and of none effect in law]. Before this act, they were only voidable by deprivation; but hereby they are made void without any deprivation; or sentence declaratory in the ecclesiastical court, as was adjudged in the case of *Hickcock* and *Hickcock*. So as the parishioners may deny their tithes, and allege in the spiritual court that he came in by simony. (*i*) But *Hutton* said, there was no remedy for the tithes,

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the performance of moral, legal, and religious duties. *Bagshaw* v. *Bossley*, 4 *T. Rep.* 78. And in a subsequent case, the condition of a bond appearing to be to reside, to keep the buildings on the living in repair, and to resign after one month's notice, in order that the patron's son, a youth of 14 years of age, might be presented to the benefice, it was declared by the court of king's bench to be legal, without argument; this case not being precisely similar to *Ffytche*'s, and the court understanding that both parties intended to appeal to the house of lords. *Partridge* v. *Whiston*, 4 *T. Rep.* 359. [and 378. confirming, *Moor*, 916. *Johns* v. *Lawrence*, *Jones*, 220. *Cro. Jac.* 248. 274. S. P.] Though the case does not appear to have gone further. [In *Newman* v. *Newman*, 815. 4 *M.* & *S.* 71. the court inclined strongly for the legality of such a bond; and *Dampier* J. said, he knew that since the *Bp. of London* v. *Ffytche*, it had been considered that bonds of resignation in *favour of specified persons* are not illegal; but see *Rowlatt* v. *Rowlatt*, 1 *J.* & *W.* 281. *Godbolt*. 390. 435. In a very late case of action on bond to resign a living to a relation of plaintiff, which the defendant had refused to do, the jury in assessing the damages had calculated them by as many years' purchase as the life of the party disappointed was worth, taking the living at the gross receipt; and the defendant still refusing the plaintiff's offer to give up all claims to damages if he would resign, the court refused to set aside the verdict. *Ld. Sondes* v. *Fletcher*, 5 *Bar.* & *Ald.* 335. In debt on bond, though part of the condition for presentation of the obligee's son may or may not be simoniacal, yet the bond is good for payment of the money, *Newman* v. *Newman*, 4 *M.* & *S.* 66. So in *Greenwood* v. *Bp. of London*, 5 *Taunt.* 727. 1 *Marsh. R.* 292. S. C., conveyance of an advowson, admitting it to be void for the next presentation by reason of simony, was held good for the remaining interest, which might fairly be separated from the objectionable part.] Yet if the bond is general for resignation, some special reason must be shown to require a resignation, or the court of chancery will not suffer it to be put in suit: for otherwise, simony would be committed without the possibility of proof or punishment. *Treat. of Eq. by Fonb.* 220, 221. with the cases there cited.

(*i*) Or in an action for treble damages may plead him no parson, because of the simony. *Hob.* 168. *March.* 84. But in an action for use and occupation by an incumbent against a tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff in order to avoid his title, because having occupied by the licence of his landlord, he cannot afterwards, in such an action, dispute his title. *Cooke* v. *Loxley*, 5 *T. Rep.* 4. So where the occupier of land has entered into an agreement for a composition for tithes, he cannot set up as a defence to an action on such agreement

which a simoniacal incumbent had actually received. 1 *Inst.* 120. *Gibs.* 800, 1. *Litt. Rep.* 177.

But here is to be observed a diversity, between a presentation or collation made by a rightful patron, and an usurper. For in case of the rightful patron, which doth corruptly present or collate, by the express letter of this act the king shall present; but when one doth usurp, and corruptly present or collate, there the king shall not present, but the rightful patron: for the branch that gives the king power to present, is only intended where the rightful patron is in fault; but where he is in no fault, there the corrupt act and wrong of the usurper shall not prejudice his title. 3 *Inst.* 153.

And it shall be lawful for the queen to present for that one time or turn only] In this particular, the penalty of simony which was by the canon law, with regard to the patron, is somewhat miti- [367] gated: the canons which had been made both at home and abroad (when they speak of this loss of patronage) making it perpetual. (*k*) But because patronage in England is accounted a temporal matter, and corrupt patrons were not to be reached by the ecclesiastical laws (which could only touch the incumbent): therefore, for the more effectual discouragement of simony, by affecting the patron also, this statute was made. *Gibs.* 801.

And every person .... that shall take or make any such promise] So that the penalty (as it seemeth) is incurred by such promise; though the patron should afterwards present the clerk gratis. *Gibs.* 801.

Shall forfeit and lose the double value of one year's profit] And this double value shall be accounted, according to the true value as the same may be letten, and shall be tried by a jury; and not according to the valuation in the king's books. 26 *H.* 8. 3 *Inst.* 154.

And the person so corruptly taking, procuring, seeking, or accepting] It was said by *Tanfield* chief baron, in *Calvert* and *Kitchyn*'s case, that if a clerk *seeketh* to obtain a presentation by money, although afterwards the patron present him gratis; yet this simoniacal attempt hath disabled him to take that benefice. *Gibs.* 801.

Be adjudged a disabled person in law, to have or enjoy the same benefice] Many of the ancient canons of the church, make *deposition* the punishment of simony, whether in bishops or presbyters; others make it *deprivation*. But the civil and canon law observe a difference in point of penalty, between a person guilty

that the incumbent was simoniacally presented. *Brooksby* v. *Watts*, 6 *Taunt.* 333. 2 *Marsh.* 38.

(*k*) *Qui emit jus patronatûs ut possit præsentare filium vel nepotem seu quem vult, eo privari debet.* 8 X. 3. 18. 6.

of simony, and a person simoniacally promoted. If the clerk himself is privy or party to the simony, he is to be deprived of that, and for ever disabled to accept any other; but if he is only simoniacally promoted, by simony between two other persons, whereunto he was not privy, he is deprivable by reason of the corruption, but not disabled to take any other. In like manner, according to this statute, if the presentee was not privy to the simony, though the church is become void by the simony, yet he is not disabled from being presented again; for a man cannot be said to be *corruptly taking*, who is not privy to the corrupt agreement. But a presentee who was privy to the simony, is a person
[368] disabled to enjoy the same benefice during life, nor can the king or any other dispense with the disability. *Gibs.* 801. 2 *Haw.* 396. [*Hutchinson*'s case,] 12 *Rep.* 101.

§ 6. *Admit*, institute (7), *install*, *induct*] The reason of this clause, lord *Coke* tells us (for, he says, he was of that parliament, and observed the proceedings therein) was to avoid hasty and precipitate admissions and institutions, to the prejudice of them that had right to present, by putting them to a *quare impedit*; and it is presumed, that no such haste or precipitation is used, but for a corrupt end and purpose. 3 *Inst.* 155.

Immediately after the investing, installation, or induction] Albeit the church is full by institution, against all but the king: yet the church becometh not void by this branch of the act, until after induction. 3 *Inst.* 155.

§ 9. *Shall not in any wise extend to take away or restrain any punishment, pain, or penalty, limited, prescribed, or inflicted by the laws ecclesiastical*] So far are the ancient ecclesiastical laws against simony, and the power of the spiritual court in the execution of those laws, from being superseded by this act, that hereby they are expressly confirmed. And all promises and contracts, of what kind soever, being forbidden, and by consequence punishable, by the laws ecclesiastical; it follows, that it could not be the intention of the legislators, to make this statute the rule and measure of simony; but only to check and restrain it in the most notorious instances. *Gibs.* 801.

Which consideration seemeth fully to warrant bishop *Stillingfleet*'s observation, that this statute doth not abrogate the ecclesiastical laws as to simony, but only enacteth some particular penalties on some more remarkable simoniacal acts, as to benefices and orders; but doth not go about to repeal any ecclesiastical laws about simony, or to determine the nature and bounds of it: And also the observation of archbishop *Wake*; that this

(7) A lay patron may revoke his presentation before institution; and such revocation not amounting to a corrupt agreement to present cannot be void for simony. *Rogers* v. *Holled*, 2 *Bla. Rep.* 1039.

act is not privative of the jurisdiction of the church, or its constitutions, but accumulative; that it leaveth to the church all the authority which it had before; only, whereas before these crimes were inquirable and punishable by the ecclesiastical judge alone, they may now, in some cases specified in this statute, be brought before the civil magistrate also. *Gibs.*798.

And therefore still the ecclesiastical court may proceed against a simonist *pro salute animæ*, and upon examination and evidence deprive him for that cause: and this, although he was not privy to the contract; for there are no accessaries in simony. And when the spiritual court hath so sentenced the simony, the temporal court ought to give credence thereto, and ought not to [369]
dispute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reason that in the temporal court it sufficeth to plead a sentence out of the spiritual court briefly, without showing the manner thereof, and of their proceedings. (*l*) And though it hath been said, that in the spiritual court they ought not to intermeddle to divest the freehold, which is in the incumbent after induction; it is true, indeed, they cannot alter the freehold, but they by their proceeding meddle only with the manner of obtaining the presentment, which by consequence only divesteth the freehold from the simonist by the dissolution of his estate, when his admission and institution are voided; and therefore may proceed: or rather the church being made void by act of parliament, he who pretends to be incumbent thereof hath no freehold therein: so, depriving of him, cannot be said to divest any freehold from him. However, it is best, that not any of the articles to be examined upon in this case, be such as may expressly draw the right and title of the benefice into question; lest occasion be taken from thence to bring a prohibition. *Wats. c.* 5.

2. *By the* 1 *W. c.* 16. *Whereas* it hath often happened, that *persons simoniac or simoniacally promoted to benefices or ecclesiastical livings, have enjoyed the benefit of such livings many years, and sometimes all their life time, by reason of the secret carriage of such simoniacal dealing*; and *after the death of such simoniac person, another person innocent of such crime, and worthy of such preferment, being presented or promoted by any other patron innocent also of that simoniacal contract, have been troubled and removed upon pretence of lapse or otherwise, to the prejudice of the innocent patron in reversion, and of his clerk* (8), whereby the guilty goeth

(*l*) 3 *Bulst.* 182. *Freem.* 84.

(8) For before this statute it was held that if a person who had acquired a benefice by simony enjoyed it during his life, the king might present after his death, because the church, notwithstanding

away with the profit of his crime, and the innocent succeeding patron and his clerk are punished, contrary to all reason and good conscience: for prevention thereof it is enacted, that after the death of the person so simoniacally promoted, the offence or contract of simony shall neither by way of title in pleading, or in evidence to a jury, or otherwise, be alleged or pleaded to the prejudice of any other patron innocent of simony, or of his clerk
[370] by him presented or promoted, upon pretence of lapse to the crown or to the metropolitan or otherwise; unless the person simoniac or simoniacally promoted, or his patron, was convicted of such offence at the common law or in some ecclesiastical court, in the life time of the person simoniac or simoniacally promoted or presented. § 1, 2.

And no lease really and *bonâ fide* made by any person simoniac or simoniacally promoted to any deanery, prebend or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy to or having notice of such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding. § 3.

3. By the 12 *An. st.* 2. *c.* 12. Whereas some of the clergy have procured preferments for themselves, by buying ecclesiastical livings, and others have been thereby discouraged; it is enacted, that if any person shall for any sum of money, reward, gift, profit or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend or living ecclesiastical, and shall be presented or collated thereupon; every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of none effect in law, and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the queen, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same, and shall also be subject to any punishment, pain

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the institution and induction of the simonist, remained void to the king's presentation before his death, which could not make him incumbent who was none before, or otherwise alter the case. 1 *Brownl.* 164. *Wats.* 96.

or penalty, limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made, after such benefice, dignity, prebend, or living ecclesiastical had become vacant; any law or statute to the contrary in any wise notwithstanding.

Which statute having been understood as only prohibiting *clergymen* from purchasing livings for themselves; the intention thereof (if that was its sole intention) may be easily frustrated by employing others to purchase for them. (9) [But *semble* this falls within the oath required by *Can.* 40. See *ante*, 1. 4.]

The form of a general *bond of resignation hath been thus :* [371]

KNOW all men by these presents, that we A. B. of ——— in the county of ——— clerk, and C. D. of ——— in the county of ——— gentleman, are held and firmly bound to E. F. of ——— in the county of ——— esquire, in the sum of —— of good and lawful money of Great Britain, to be paid to the said E. F. or to his certain attorney, his executors, administrators or assigns: For the true payment whereof, we bind ourselves and each of us, jointly and severally, and each and every of our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this —— day of —— in the —— year of the reign of our sovereign lord George the Third of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and sixty-three.

WHEREAS the above-named E. F. is seised of or entitled to the advowson, nomination, right of patronage and presentation of the vicarage [or rectory] of the parish church of G. in the county of ——— and diocese of ——— which is now become vacant; and whereas the said E. F. hath presented, nominated, and appointed the above-bound A. B. to supply the said vacancy, and to be vicar of the said vicarage and parish church of G, in order for him, the said A. B. to be instituted and inducted thereto by the proper ordinary; and whereas the said A. B. hath agreed to resign and deliver up the said vicarage and parish church of G. into the hands of the proper ordinary, upon the request of the said E. F., his heirs, executors, administrators

(9) Mr. Fearne did not consider a purchase of an *advowson in fee* by a clerk, and a presentation of himself on the death of an incumbent, to be within this statute, and that a presentation by a trustee of such a purchaser, of the purchaser himself, might be made. See his Cases and Opinions, 409., and see *Barrett* v. *Glubb, supra*, 352. *n*. 8.

or assigns, or upon notice in writing given to him or left for him for that purpose at the vicarage house of the said vicarage by the said E. F., his heirs, executors, administrators or assigns, so that thereby the said vicarage and parish church may become vacant, and the said E. F., his heirs, executors, administrators or assigns, patrons of the said church, may present anew: Now the condition of the above-written obligation is such, that if the above-bound A. B. do and shall upon the request of the said E. F., his heirs, executors, administrators or assigns, or upon notice in writing given to him the said A. B. or left for him for that purpose at the vicarage house of the said vicarage by the said E. F., his heirs, executors, administrators or assigns, absolutely resign and deliver up the said vicarage and parish church of G. aforesaid, with its appurtenances, into the hands of the proper ordinary or guardian of the spiritualities for the time being, abso-
[372] lutely to accept of such resignation of the said vicarage and parish church of G. whereby the said vicarage and parish church of G. may become vacant, and the said E. F., his heirs, executors, administrators or assigns, patrons of the said church, may present anew to the said vicarage and parish church discharged of all charges and incumbrances done or suffered by the said A. B.; and also if the said A. B. do not or shall not commit or suffer, or cause to be committed, any waste or dilapidations, upon the houses, lands, tenements, or hereditaments belonging to the said vicarage during the time he shall be so vicar of the said vicarage and parish church; Then this obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed, and delivered (the paper having been first duly stamped) in the presence of us, — A. B.
C. D.

H. I.
K. L.

Sinecure.

Original of sinecures.

1. THE original of sinecures was thus: The rector (with proper consent) had a power to intitle a vicar in his church to officiate under him; and this was often done: and by this means, two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are in common opinion discharged from the cure of souls (which is the reason of the name) and however the cure is said in the law books to be in them *habitualiter* only; yet in strictness, and with regard to their original institution, the

cure is in them *actualiter*, as much as it is in the vicar. *Gibs.* 719. *Johns.* 85.

That is to say, where they come in by institution; but if the rectory is a donative, the case is otherwise; for their coming in by donation, they have not the cure of souls committed to them. And these are most properly sinecures, according to the genuine signification of the word. *Johns.* 85.

No sinecure where there is but one incumbent.

2. But no church, where there is but one incumbent, is properly a sinecure. If indeed the church be down or the parish become destitute of parishioners, without which divine offices cannot be performed, the incumbent is of necessity acquitted from all public duty; but still he is under an obligation of doing this [373] duty, whenever there shall be a competent number of inhabitants, and the church shall be rebuilt. And these benefices are more properly depopulations than sinecures. *Johns.* 84.

Bishoprics, deaneries, archdeaconries, prebends.

3. Bishoprics, deaneries, and archdeaconries, were of old generally said to have the cure of souls belonging to them; some have said the same of prebends, but with less reason. Bishops have the cure of their whole dioceses; and archdeacons do, in many particulars, share with them in their spiritual cures. The dean was said to have the cure of his canons, and of the rest belonging to the choir; who were all in old time to make their confessions to him, and receive absolutions from him; but it doth not appear, that the canons or prebendaries have or had the cure of souls, in this or any other respect. They are indeed for the most part instituted, but not to the cure of souls. *Johns.* 86.

Possession of sinecures how obtained.

4. Possession of sinecures (not being exempt as is aforesaid) must be obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely, by presentation, institution, and induction. And the reason is, because the vicarage had not its beginning by appropriation and endowment (which was a discharge to the parson from the cure), but by *intitulation*, that is by being admitted to a title, or a share in the profits and cure of the rectory, together with the rector, and in subordination to him as vicar. For although by a constitution of archbishop Langton there might not be two rectors or parsons in one church; yet there might be, and sometimes were established in the same church both a rector and vicar, with cure of souls: and in such case, the rectory came to be a sinecure, not because it was really so in law, but because the rectors got themselves excused from residence, and by degrees devolved the whole spiritual cure upon the vicars. *Gibs.* 818.

Upon which ground, the possessors of sinecures are not bound to read the thirty-nine articles by the 13 *El. c.* 12. And in this only, institution to sinecures differs from institution to other benefices. *Johns.* 86.

Not within the statute of pluralities [or clergy residence act.] 5. Sinecures are not within the statute of pluralities, such livings being not by the said statute deemed incompatible; but only those to which the cure of souls is actually and not only habitually annexed. *Deg. p.* 1. *c.* 13. [Nor within 57 *Geo.* 3. *c.* 99. see §§ 72. 81.]

[374] **Singing of psalms.** See **Public worship.**

Slander. See **Defamation.**

Sodomy. See **Buggery.**

Son, succeeding his father in a benefice. See **Benefice.**

Spoliation.

SPOLIATION is a writ obtained by one of the parties in suit, suggesting that his adversary (*spoliavit*) hath wasted the fruits, or received the same, to the prejudice of him who sueth out the writ. 1 *Ought.* 13.

And a cause of spoliation shall be tried in the spiritual court, and not in the temporal. And this suit lieth for one incumbent against another, where they both claim by one patron, and where the right of the patronage doth not come in question or debate. As if a parson be created a bishop, and hath a dispensation to keep his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the bishop may have against that incumbent a spoliation in the spiritual court, because they claim both by one patron, and the right of the patronage doth not come in debate, and because the other incumbent came to the possession of the benefice by the course of the spiritual law, that is to say, by institution and induction; so that he hath colour to have it, and to be parson by the spiritual law: for otherwise, if he be not instituted and inducted, spoliation lies not against him, but rather a writ of trespass, or an assize of novel disseisin. *Terms of the L.*

So it is also, where a parson who hath a plurality doth accept another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted: Now the one of them may have a spoliation against the other, and then shall come in debate whether he hath a sufficient plurality or not. And so it is in case of deprivation. *T. L.*

The same law is, where one telleth the patron that his clerk is dead; whereupon he presents another; there the first incumbent, who was supposed to be dead, may have a spoliation against
[375] the other. And so in divers other like cases. *T. L.*

If a patron do present a clerk unto an advowson, who is instituted and inducted, and afterwards another man doth present another clerk to the same advowson, who is also instituted and inducted; there, one of them shall not have a spoliation against the other, if he disturb him of the church, or do take away the fruits thereof; because the right of the patronage doth come in debate in the spiritual court which of the patrons hath a right to present. And therefore in that case, if one of them sue a spoliation against the other, he shall have prohibition unto the spiritual court, and no consultation shall be granted for the cause aforesaid. *F. N. B.* 86.

When spoliation is brought to try which of two persons instituted is the rightful incumbent of a parsonage or vicarage, or after sentence given against one of the parties who hath appealed; it is usual for the ecclesiastical judge, at the petition of either of the parties, to decree that the fruits of the church be sequestered, and to commit the power of collecting them to the churchwardens or some others of the same parish, first taking bond of such persons, whereby they shall be obliged to collect and keep the tithes for the use of him that shall be found to have the right, and to render a just account when called thereunto. And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church, to the parson that he orders to attend the cure. And after the suit is determined, the sequestration is to be taken off, and the profits collected to be restored to him that prevails at law; to wit, in specie, if they remain so, or if not, the value of them. *Wats. c.* 30.

Stamps. [376]

MOST of the stamp duties are inserted under their respective *titles;* I therefore think it advisable to omit them here entirely, particularly as they are now so numerous, that they would fill several pages. [See *Digest of the Statutes* by *Tyrwhitt & Tyndale*, tit. *Stamps.*]

Stipendiary priests. [377]

THE stipendiary priests were for trentals, anniversaries, obits, and such like, grounded on the doctrine of purgatory and

masses satisfactory. And for these chantries were founded and endowed, to pray for the souls of the founder and his friends: Which chantries were dissolved by the statute of the 1 *Ed.* 6. *c.* 14.

Striking in the church or church-yard. See **Church.**

Subdeacon.

SUBDEACON is one of the five inferior orders in the Romish church; whose office it is to wait upon the deacon in the administration of the sacrament of the Lord's supper. *Gibs.* 99.

Suffragan. See **Bishops.**

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Suicide.

BY the rubric before the burial office; persons who have laid violent hands upon themselves, shall not have that office used at their interment.

And the reason thereof given by the canon law is, because they die in the commission of a mortal sin (*Lind.* 164.); and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, as children under the age of discretion, or the like; so also not to those who do it involuntarily, as where a man kills himself by accident: for in such case it is not their crime, but their very great misfortune.

Sunday. See **Lord's day.**
Superinstitution. See **Benefice.**
Supposititious births. See **Bastards.**

Supremacy.

King's supremacy by the common law.

1. LORD chief justice *Hale* says: The supremacy of the crown of England in matters ecclesiastical is a most indubitable right of the crown, as appeareth by records of unquestionable truth and authority. 1 *H. H.* 75.

Lord chief justice *Coke* saith: By the ancient laws of this

realm, this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king; and of a body consisting of several members, which the law divideth into two parts, the clergy and laity, both of them next and immediately under God subject and obedient to the head. 5 *Co.* 8. 40. *Caudrey's* case.

By the parliament of England in the 16 *R.*2. *c.*5. it is asserted, that the crown of England hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality of the same crown, and to none other.

And in the 24 *H.*8. *c.*12. it is thus recited: By sundry and [379] authentic histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having dignity and royal estate of the imperial crown of the same: unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spiritualty and temporalty, been bounden and owen to bear next unto God, a natural and humble obedience; he being also furnished by the goodness and sufferance of Almighty God, with plenary whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of persons resiants within this realm, in all cases, matters, debates, and contentions, without restraint or provocation to any foreign princes or potentates of the world; in causes spiritual by judges of the spiritualty, and causes temporal by temporal judges.

Again, 25 *H.*8. *c.*21. The realm of England, recognizing no superior under God, but only the king, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and obtained within this realm for the wealth of the same, or to such other as by sufferance of the king, the people of this realm have taken at their free liberty by their own consent to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince, potentate, or prelate, but as to the customed and ancient laws of this realm, originally established as laws of the same by the said sufferance, contents, and custom, and none otherwise.

By the canons of the church.

2. *Can.* 1. As our duty to the king's most excellent majesty requireth, we first decree and ordain, that the archbishop from time to time, all bishops, deans, archdeacons, parsons, vicars, and all other ecclesiastical persons, shall faithfully keep and observe, and as much as in them lieth shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom, the ancient jurisdiction

over the state ecclesiastical, and abolishing of all foreign power repugnant to the same. Furthermore, all ecclesiastical persons having cure of souls, and all other preachers, and readers of divinity lectures, shall to the utmost of their wit, knowledge, and
[380] learning, purely and sincerely (without any colour of dissimulation) teach, manifest, open, and declare, four times every year at the least, in their sermons and other collation and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of God) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection within his majesty's realms and dominions is due unto any such foreign power; but that the king's power, within his realms of England, Scotland, and Ireland, and all other his dominions and countries, is the highest power under God, to whom all men, as well inhabitants as born within the same, do by God's laws owe most loyalty and obedience, afore and above all other powers and potentates in the earth.

Can. 2. Whoever shall affirm, that the king's majesty hath not the same authority in causes ecclesiastical, that the godly kings had amongst the Jews and christian emperors of the primitive church, or impeach any part of his regal supremacy in the said causes restored to the crown, and by the laws of this realm therein established; let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of those his wicked errors.

Can. 26. No person shall be received into the ministry, nor admitted to any ecclesiastical function, except he shall first subscribe (amongst others) to this article following: That the king's majesty under God is the only supreme governor of this realm, and of all others his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate, hath, or ought to have any jurisdiction, power, superiority, preeminence, or authority ecclesiastical or spiritual, within his majesty's said realms, dominions, and countries.

By the thirty-nine articles.

3. *Art.* 37. The queen's majesty hath the chief power in this realm of England, and other her dominions; unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain: and is not, nor ought to be subject, to any foreign jurisdiction. But when we attribute to the queen's majesty the chief government, we give not thereby to our princes the ministering either of God's word, or of the sacraments; but that only prerogative which we see to have been given always to all godly princes in holy scripture by God himself, that is, that they should rule all estates and degrees committed to their charge by God, whether they

be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers. The bishop of Rome hath no jurisdiction in this realm of England.

By act of parliament.

4. Albeit the king's majesty justly and rightfully is and ought to be the supreme head of the church of England, and so is *recognized by the clergy of this realm in their convocations*, yet nevertheless for corroboration and confirmation thereof, and for the increase of virtue in Christ's religion, and to repress all errors, heresies, and other enormities and abuses; it is enacted, That the king our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the church of England; and shall have and enjoy, annexed to the imperial crown of this realm, as well the style and title thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the said dignity of supreme head of the same church belonging and appertaining; and shall have power from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities whatsoever they be, which by any manner of spiritual authority or jurisdiction may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended most to the pleasure of Almighty God, the increase of virtue in Christ's religion, and for the conservation of the peace, unity, and tranquillity of this realm; any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary notwithstanding. 26 *H.* 8. *c.* 1.

Recognized by the clergy of this realm in their convocations] Which recognition, after deliberation and debate in both houses of convocation, was at length agreed upon in these words,— *ecclesiæ et cleri Anglicani, cujus singularem protectorem unicum, et supremum dominum, et quantum per Christi legem licet, etiam supremum caput ipsius majestatem recognoscimus.* Gibs. 23.

The king's style and title.

5. Whereas the king hath heretofore been and is justly and lawfully and notoriously known, named, published, and declared to be king of England, France, and Ireland, defender of the faith, and of the church of England and also of Ireland in earth supreme head, and hath justly and lawfully used the title and name thereof; it is enacted, That all his majesty's subjects shall from henceforth accept and take the same his majesty's style, as it is declared and set forth in manner and form following, viz. "Henry the Eighth, by the grace of God, king of England, [382] "(since the union with Scotland, king of Great Britain,) France, "and Ireland, *defender of the faith, and of the church of England* "*and also of Ireland in earth the supreme head:*" and the said style shall be for ever united and annexed to the imperial crown of this realm. 35 *H.* 8. *c.* 3.

Defender of the faith] This title, although sometimes attributed to our kings before, yet was peculiarly and in a more solemn manner given to king Hen. 8. by pope Leo 10. for writing against Luther.

And of the church of England and also of Ireland in earth the supreme head] These are the words which seem to be understood, in the abbreviated style of the king, as it is now usually expressed, [*defender of the faith, and so forth.*]

Penalty of denying the king's supremacy.

6. By the 1 *Ed.* 6. *c.* 12. If any person shall by *open preaching, express words, or sayings*, affirm or set forth, that the king is not or ought not to be supreme head in earth of the church of England and Ireland, or any of them, immediately under God; or that the bishop of Rome or any other person than the king of England for the time being is or ought to be by the laws of God supreme head of the same churches or of any of them; he, his aiders, comforters, abettors, procurers, and counsellors, shall (on conviction by the oath of two witnesses or confession) for the first offence forfeit his goods and be imprisoned during the king's pleasure: for the second offence shall forfeit his goods, and also the profits of his lands and spiritual promotions during his life, and also be imprisoned during his life; and for the third offence shall be guilty of high treason. § 6. 22.

And if any person shall by *writing, printing, overt deed or act*, affirm or set forth, that the king is not or ought not to be supreme head in earth of the church of England and Ireland, or of any of them, immediately under God; or that the bishop of Rome, or any other person than the king of England for the time being, is or ought to be by the laws of God or otherwise, the supreme head in earth of the same churches or any of them; he (his aiders, comforters, abettors, procurers, and counsellors) shall (on conviction by the oath of two witnesses or confession) be guilty of high treason. § 7. 22.

But no person shall be prosecuted for the said offences by *open preaching or words only*, but within thirty days after such preaching or speaking, if the accusers be within the realm during
[383] the said thirty days; if not, then within six months after such preaching or words spoken; and not otherwise. —— The accusation to be made to one of the king's counsel, or to a justice of assize, or a justice of the peace being of the quorum, or to two justices of the peace within the shire where the offence was committed. § 19.

But as to offences made treason by this act, the same is so far repealed by the 1 *Mar. sess.* 1. *c.* 1. which enacteth, that no offence made high treason by act of parliament, shall be adjudged high treason, but only such as is expressed in the statute of the 25 *Ed.* 3. But as to the rest this statute continueth in force.

But by the 1 *El. c.* 1. it is further enacted as followeth; viz. that no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence or privilege, spiritual or ecclesiastical, within this realm or any other her majesty's dominions or countries; but the same shall be abolished thereout for ever: any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary notwithstanding. § 16.

And such jurisdictions, privileges, superiorities, and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever be united and annexed to the imperial crown of this realm. § 17.

And if any person shall by *writing, printing, teaching, preaching, express words, deed or act,* advisedly, maliciously, and directly affirm, hold, stand with, set forth, maintain, or defend the authority, pre-eminence, power, or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate whatsoever, heretofore claimed, used, or usurped within this realm, or any other her majesty's dominions or countries; or shall, advisedly, maliciously and directly put in ure or execute any thing for the extolling, advancement, setting forth, maintenance or defence of any such pretended or usurped jurisdiction, power, pre-eminence and authority, or any part thereof; he, his abettors, aiders, procurers, and counsellors, shall for the first offence forfeit all his goods, and if he hath not goods to the value of 20*l.* he shall also be imprisoned for a year, and the benefices [384] of every spiritual person offending shall also be void; for the second offence shall incur a præmunire; and for the third shall be guilty of high treason. § 27—30.

But no person shall be molested for any offence committed only by *preaching, teaching, or words,* unless he be indicted within one half year after the offence committed. § 31.

And no person shall be indicted or arraigned but by the oath of two or more witnesses: which witnesses, or so many of them as shall be living, and within the realm at the time of the arraignment, shall be brought face to face before the party arraigned if he require the same. § 37.

Penalty of asserting the pope's supremacy.

7. If any person shall by *writing, ciphering, printing, preaching or teaching, deed or act,* advisedly and wittingly hold or stand with, to extol, set forth, maintain or defend the authority, jurisdiction or power of the bishop of Rome or of his see, heretofore claimed, used, or usurped within this realm, or in any of her ma-

jesty's dominions; or by *any speech, open deed, or act*, advisedly and wittingly attribute any such manner of jurisdiction, authority, or pre-eminence to the said see of Rome or to any bishop of the same see for the time being; he, his abettors, procurers, and counsellors, his aiders, assistants, and comforters, upon purpose and to the intent to set forth, further, and extol the said usurped power, being indicted or presented within one year, and convicted at any time after, shall incur a præmunire. 5 *El. c.* 1. § 2.

And the justices of assize, or two justices of the peace (one whereof to be of the quorum) in their sessions, may inquire thereof, and shall certify the presentment into the king's bench in forty days, if the term be then open; if not, at the first day of the full term next following the said forty days: on pain of 100*l.* § 3.

And the justices of the king's bench, as well upon such certificate as by inquiry before themselves, shall proceed thereupon as in cases of præmunire. § 4.

But charitable giving of reasonable alms to an offender, without fraud or covin, shall not be deemed abetting, procuring, counselling, aiding, assisting, or comforting. § 18.

Oath of supremacy.

8. The papal encroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil, under that loose pretence of *in ordine ad spiritualia*, had obtained
[385] a great strength and long continuance in this realm, notwithstanding the security the crown had by the oaths of fealty and allegiance; so that there was a necessity to unrivet those usurpations, by substituting by authority of parliament a recognition by oath of the king's supremacy, as well in causes ecclesiastical as civil; and thereupon the oath of supremacy was framed. 1 *H. H.* 75.

Which oath, as finally established by the 1 *W. c.* 8. is as follows: "I A. B. do swear, that I do from my heart abhor, detest, "and abjure, as impious and heretical, that damnable doctrine "and position, that princes excommunicated or deprived by the "pope or any authority of the see of Rome, may be deposed or "murdered by their subjects, or any other whatsoever. And I "do declare, that no foreign prince, person, prelate, state, or "potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, "within this realm: So help me God." (*m*)

(*m*) By the 31 *G.* 3. *c.* 32. § 18. No person shall be summoned to take the oath of supremacy, or be prosecuted for not obeying such summons; but Roman Catholics, in order to enjoy the benefits of that act, for which see the title Popery, are to take, in the manner therein directed, the oath introduced by it; for which see Oaths, 20. B.

9. But lastly, the usurped jurisdiction of the pope being abolished, and there being no longer any danger to the liberties of the church or state from that quarter; and divers of the princes of this realm having entertained more exalted notions of the supremacy both ecclesiastical and civil, than were deemed consistent with the legal establishment and constitution; it was thought fit at the Revolution to declare and express how far the regal power, in matters spiritual as well as temporal, doth extend: that so as well the just prerogative of the crown on the one hand, as the rights and liberties of the subject on the other might be ascertained and secured. Therefore by the statute of the 1 *W.* *c.* 6. it is enacted as followeth:

Supremacy limited and defined by the acts of settlement at the Revolution.

" Whereas by the law and ancient usage of this realm, the kings and queens thereof have taken a solemn oath upon the evangelists at their respective coronations, to maintain the statutes, laws, and customs of the said realm, and all the people and inhabitants thereof in their spiritual and civil rights and properties; but forasmuch as the oath itself, on such occasion administered, hath heretofore been framed in doubtful words and expressions, [386] with relation to ancient laws at this time unknown; to the end therefore that one uniform oath may be in all times to come taken by the kings and queens of this realm, and to them respectively administered, at the times of their and every of their coronation, it is enacted, that the following oath shall be administered to every king or queen who shall succeed to the imperial crown of this realm, at their respective coronations, by one of the archbishops or bishops of this realm of England for the time being, to be thereunto appointed by such king or queen respectively, and in the presence of all persons that shall be attending, assisting, or otherwise present at such their respective coronations: that is to say,

" The archbishop or bishop shall say, Will you solemnly promise and swear, to govern the people of the kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same? The king or queen shall say, I solemnly promise so to do.

" Archbishop or bishop: Will you to your power cause law and justice in mercy to be executed in all your judgments? The king or queen shall answer, I will.

" Archbishop or bishop: Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges, as by law do or shall appertain unto them or any of them? The king or queen shall answer, All this I promise to do. After this, laying his or her hand upon the holy gospels, he

or she shall say, The things which I have here before promised, I will perform and keep; So help me God: And shall then kiss the book."

And by the 1 *W. sess.* 2. *c.* 2. "Whereas the late king James the second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

[387] 3. By issuing and causing to be executed a commission under the great seal for erecting a court called The court of commissioners for ecclesiastical causes.

4. By levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner than the same was granted by parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed, contrary to law.

7. By violating the freedom of election of members to serve in parliament.

8. By prosecutions in the court of king's bench, for matters and causes cognizable only in parliament: and by divers other arbitrary and illegal causes.

9. And whereas of late years partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

And whereas the said late king James the second, having abdicated the government, and the throne being thereby vacant, his

highness the prince of *Orange* (whom it has pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did, by the advice of the lords spiritual and temporal and divers principal persons of the commons, cause letters to be written to the lords spiritual and temporal being protestants; and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them, as were of right to be sent to parliament, to meet and sit at Westminster upon the 22d day of January in this year 1688, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted: upon which letters, elections having been [388] accordingly made, and thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like cases have usually done) for the vindicating and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending laws, or the execution of laws by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and court of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner, than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king; and all commitments and prosecutions for such petitioning, are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants, may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impannelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

[389] 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example."

The truth is, that after the abolition of the papal power, there was no branch of sovereignty with which the princes of this realm, for above a century after the Reformation, were more delighted than that of being the supreme head of the church: imagining (as it seemeth) that all that power which the pope claimed, and exercised (so far as he was able), was by the statutes abrogating the papal authority annexed to the imperial crown of this realm: not attending to the necessary distinction, that it was not that exorbitant lawless power which the pope usurped, that was thereby become vested in them; but only, that the ancient legal authority and jurisdiction of the kings of England in matters ecclesiastical, which the pope had endeavoured to wrest out of their hands, was re-asserted and vindicated. The pope arrogated to himself a jurisdiction superior not only to his own canon law, but to the municipal laws of kingdoms. And those princes of this realm above mentioned seem to have considered themselves plainly as popes in their own dominions. Hence one reason why a reformation of the ecclesiastical laws was never effected, seemeth to have been, because it conduced more to the advancement of the supremacy to retain the church in an unsettled state, and consequently more dependent on the sovereign will of the prince. Hence became established the office of lord vicegerent in causes ecclesiastical; and after that the high commission court; and last of all, the dispensing power or a power of dispensing with or suspending the execution of laws at the prince's pleasure. Therefore, to remove these grievances, these acts prescribed the just boundaries of the prerogative, both ecclesiastical and civil, and established the rights both of prince and people upon the firmest and surest foundation, namely, the known law of the land; and thereby rendered the name of an English monarch respectable among the princes of the earth. A king ruling by the established laws of his kingdom, that is, with an extensive power [390] of doing right, and an utter inability of doing wrong, is the perfection of the human nature, and the glory of the divine; and renders kings, in a most emphatical sense, God's vicegerents.

From which premises may be deduced also the genuine cause, why the civil and canon laws have received so much check and

discouragement from time to time within this kingdom. They are founded upon the principles of arbitrary power.

The civil law is said to be the common municipal law of all the arbitrary states in Europe (modified only according to the different circumstances of each government); and those princes of this realm who have most affected absolute sovereignty, have been proportionable encouragers of the civil law. The canon law hath the same lineaments and features; being framed to render the pope in the church, what the emperor was in the state. And it must be owned, they are both perhaps more for the ease of the governors, but not so convenient for the governed.

Particularly as to the enacting part: They owe their very existence to the sovereign will of the supreme governor; and consequently, what is law to-day, may not be law to-morrow; for the same power which enacteth may repeal. —— *For such is our will* —— is a harsh and grating sound to an English ear; being the sullen voice of insolence and wanton power. How much more humane is that declaration —— *Be it enacted by the king's most excellent majesty, by and with the advice and assent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same.*

Again, as to the executive part, especially with respect to criminal prosecutions.—A person accused in the dark; witnesses not confronted with the party face to face; the cruel oath *ex officio*, whereby a man is compelled to accuse himself (not to mention the diabolical rack and torture;) and the whole determined at last by the sole decision of the judge, who must needs be oftentimes an entire stranger to the parties; are disparagements of those laws, which will always obstruct their progress in a land of liberty. How much more mild and gentle is that law, which is the birthright of every Englishman however otherwise destitute and friendless, whereby he shall not be called upon to answer for any crime he is charged withal, but upon the oaths of at least twelve men of considerable rank and fortune within the county in which the offence is supposed to have been committed, if they shall see probable cause for further inquiry; and afterwards, shall not be condemned, but by the unanimous suffrage of other twelve men, his neighbours and equals in degree and [391] station of life, upon their oaths likewise; and at the same time he hath a right to object to any one who is summoned to try him for his offence, if he hath a reasonable cause of exception. —The one is the law of tyrants; the other of freemen, and may it ever prosper in the British soil!

By the act of union of the two kingdoms of England

10. Finally, by the act of union of the two kingdoms of England and Scotland, 5 *An. c.* 8., it is enacted, that after the demise of her majesty queen Anne, the sovereign next succeeding, and so for ever afterwards every king or queen succeeding and com-

and Scotland. ing to the royal government of the kingdom of Great Britain, at his or her coronation, shall in the presence of all persons who shall be attending, assisting, or otherwise then and there present, take and subscribe an oath, to maintain and preserve inviolably the settlement of the church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the kingdoms of England and Ireland, the dominion of Wales, and town of Berwick upon Tweed, and the territories thereunto belonging.

And shall also swear and subscribe, that they shall inviolably maintain and preserve the settlement of the true protestant religion, with the government, worship, discipline, right, and privileges of the church of Scotland, as then established by the laws of that kingdom. [See **Ireland** and **Scotland**.]

Surgeons. See **Physicians.**
Surplice. See **Church**, and **Public worship.**

Surrogate.

BY *Can.* 128. No chancellor, commissary, archdeacon, official or any other person using ecclesiastical jurisdiction, shall substitute in their absence any to keep court for them, except he be either a grave minister and a graduate, or a licensed public preacher and a beneficed man, near the place where the courts are kept, or a bachelor of law, or a master of arts at least, who hath some skill in the civil and ecclesiastical law, and is a favourer
[392] of true religion, and a man of modest and honest conversation; under pain of suspension for every time that they offend therein, from the execution of their offices for the space of three months *toties quoties:* and he likewise that is deputed, being not qualified as is before expressed, and yet shall presume to be a substitute to any judge, and shall keep any court as aforesaid, shall undergo the same censure in manner and form as is before expressed.

And by the statute of the *26 G. 2. c.* 33. No surrogate deputy by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law, to the best of his knowledge; and hath given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of his office.

His office and duty in granting such licences, is treated of in the title **Marriage.**

Suspension.

IN the laws of the church, we read of two sorts of suspension; one relating solely to the clergy, the other extending also to the laity. *Gibs.* 1047.

That which relates solely to the clergy, is suspension from office and benefice jointly, or from office or benefice singly; and may be called a temporary degradation, or deprivation of both. So we find it described by John of Athon: A person *deposed*, is he who is deprived of his office and benefice, although not solemnly; a person *degraded*, is he who is deprived of both solemnly, the ensigns of his order being taken from him; a person *suspended*, is he who is deprived of them both for a time, but not for ever. *Gibs.* 1047.

And the penalty upon a clergyman officiating after suspension, if he shall persist therein after a reproof from the bishop, is (by the ancient canon law) that he shall be excommunicated all manner of ways, and every person who communicates with him shall be excommunicated also. *Gibs.* 1047.

The other sort of suspension, which extendeth also to the laity, is suspension *ab ingressu ecclesiæ*, or from the hearing of [393] divine service, and receiving the holy sacrament; which may therefore be called a temporary excommunication. *Gibs.* 1047.

Which two sorts of suspension, the one relating to the clergy alone, and the other to the laity also, do herein agree, that both are inflicted for crimes of an inferior nature, such as in the first case deserve not deprivation, and such as in the second case deserve not excommunication: that both, in practice at least, are temporary; both also terminated, either at a certain time when inflicted for such time, or upon satisfaction given to the judge when inflicted until something be performed which he hath injoined: and lastly, both (if unduly performed) are attended with further penalties; that of the clergy, with irregularity, if they act in the mean time; and that of the laity (as it seemeth) with excommunication, if they either presume to join in communion during their suspension, or do not in due time perform those things which the suspension was intended to inforce the performance of. *Gibs.* 1047.

By the ancient canon law, sentence of suspension ought not to be given without a previous admonition; unless where the offence is such, as in its own nature requires an immediate suspension: and if sentence of suspension, in ordinary cases, be given without such previous admonition, there may be cause of appeal. *Gibs.* 1046.

[The following note, which is to be found in 1 *T. Rep.* 526. and was taken from a MS. of Sir *E. Simpson*, king's advocate and judge of the admiralty, is inserted here as appertaining to

this subject. "Offence — Undoubted rule in admiralty and ecclesiastical courts, that person suspended for an offence supposed, of which he is afterwards acquitted in proper court, is intitled to all the intermediate profits. Thus, in case of capture of prize at sea, the officer in arrest being actually on board, and afterwards duly acquitted, or restored to his station, shall share the prize money. So in civil causes in admiralty — If a master turns his mate without just cause before the mast, and he sues for wages as mate for the whole time, he may recover, though he did not do the duty. So if a clergyman be suspended *ab officio et beneficio*, and upon an appeal declared innocent, he will recover the profits of the living.

Profits — Person suspended from an office, entitled to intermediate profits, if innocent.]

Swearing.

By the canon law.

1. *CAN.* 109. If any offend their brethren by swearing; the churchwardens, or questmen and sidemen, in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws according to their deserts: and such notorious offenders shall not be admitted to the holy communion, till they be reformed.

By statute.

2. By the 19 *G.* 2. *c.* 21. If any person shall profanely curse or swear, and be thereof convicted on the oath of one witness before one justice of the peace or mayor of a town corporate, or by confession; every person so offending shall forfeit as followeth: that is to say, every day labourer, common soldier, common sailor, and common seaman, 1*s.*; and every other person under the degree of a gentleman, 2*s.*; and every person of or above the degree of a gentleman, 5*s.* And if any person after conviction offend a second time, he shall forfeit double; and for every other offence after a second conviction, treble. § 1.

And if such profane cursing or swearing shall be in the presence and hearing of a justice of the peace, or in the presence or hearing of such mayor as aforesaid; he shall convict the offender without other proof. § 2.

And if it shall be in the presence and hearing of a constable or other peace officer, he shall (if such person be unknown to him) seize, secure, and detain him, and forthwith carry him before the next justice of the peace for the county or division, or before the mayor of such town corporate, wherein the offence was committed: who shall on the oath of such constable or other peace officer convict the offender; but if such person be known

to the said constable or other peace officer, he shall speedily make information before such justice or mayor, that the offender may be by him convicted. § 3.

And such justice or mayor shall immediately, upon information given upon oath of such constable or other peace officer, or of any other person whatsoever, cause the offender to appear before him; and upon such information being proved as aforesaid, shall convict him. And if he shall not immediately pay down the sum so forfeited, or give security to the satisfaction of such justice or mayor before whom the conviction is made, such justice or mayor shall commit the offender to the house of correction, there to remain and be kept to hard labour for the space of ten days. § 4. [395]

Provided, that if any common soldier belonging to any regiment in his majesty's service, or any common sailor or common seaman belonging to any ship or vessel, shall be convicted of profane cursing or swearing as aforesaid, and shall not immediately pay down the penalty or give security for the same as aforesaid, and also the costs of the information, summons, and conviction, as by this act is directed; he shall, instead of being committed to the house of correction, be ordered by such justice or mayor to be publicly set in the stocks for the space of one hour for every single offence, and for any number of offences whereof he shall be convicted at one and the same time, two hours. § 5.

And if such justice or mayor shall wilfully and wittingly omit the performance of his duty, in the execution of this act; he shall forfeit 5*l.*, half to the informer, and half to the poor of the parish where he shall reside; to be recovered in any of his majesty's courts of record at Westminster. § 6.

And if any constable or other peace officer shall wilfully and wittingly omit the performance of his duty, in the execution of this act; and be thereof convicted by the oath of one witness, before one justice or mayor as aforesaid; he shall forfeit 40*s.* to be levied and recovered by distress and sale, and to be disposed of half to the informer and half to the poor; and if he have not sufficient goods whereon to levy the same, such justice or mayor shall commit him to the house of correction, to be kept to hard labour for one month. § 7.

And the conviction shall be drawn up in the words and form following:

Middlesex, *to wit.* } *Be it remembered, that on the —— day of —— in the —— year of his majesty's reign,* A. B. *was convicted before me, one of his majesty's justices of the peace for the county, riding, division, or liberty aforesaid;* [or, *before me, mayor, justice, bailiff, or other chief magistrate of the city or town of* ——— *within the county of* ——— as the case shall be] *of swearing one or more profane oath or oaths;* [or, *of cursing*

one or more profane curse or curses; as the case shall be]. *Given under my hand and seal, the day and year aforesaid.* § 8.

Which said form and conviction shall not be liable to be re-
[396] moved by *certiorari*, but shall be final to all intents. And the said justice or mayor, before whom the conviction shall be, shall cause the same to be fairly wrote upon parchment, and returned to the next general or quarter sessions of the peace for the county, to be filed by the clerk of the peace, and kept amongst the records. § 8.

The penalties to be disposed of for the benefit of the poor; and all charges of the information and conviction shall be paid by the offender, if able, over and above the penalties; which charges shall be settled and ascertained by such justice or mayor (so as that the clerk of such justice or mayor shall have for the information, summons, and conviction of every offender, the sum of 1*s.* and no more. § 14.) And if such party shall not be able, or shall not immediately pay the said charges and expences, or give security for the same to the satisfaction of such justice or mayor; he shall commit him to the house of correction, there to remain and be kept to hard labour for the space of six days, over and above such time for which he may be committed in default of payment of the penalties; and in such case, no charges of information and conviction shall be paid by any person whatsoever. § 10.

And if any action shall be brought against any justice of the peace, constable, or any other person whatsoever, for any thing done in execution of this act; he may plead the general issue, and give the special matter in evidence: and if a verdict shall be given for him, or the plaintiff be non-suit, or discontinue, he shall have treble costs. § 11.

Provided, that no person shall be prosecuted or troubled for any offence against the statute, unless the same be proved or prosecuted within eight days next after the offence committed. § 12.

And this act shall be publicly read four times a year in all parish churches and public chapels, by the parson, vicar, or curate, immediately after morning or evening prayer, on four several Sundays, to wit, the Sunday next after March 25., June 24., September 29., and December 25.; or in case divine service shall not be performed in any such church or chapel on such Sunday, then upon the first Sunday after: on pain of forfeiting 5*l.* for every omission or neglect; to be levied by distress and sale of the offender's goods, by warrant from such justice or mayor. § 13. [This section is *repealed*, 4 *G.* 4. *c.* 31. § 1. *Public clause*, § 2.]

And by the 22 *G.* 2. *c.* 33. *art.* 2. All flag officers, and all persons in or belonging to his majesty's ships or vessels of war, being guilty of profane oaths, cursings, execrations, or other

scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court martial shall think fit to impose, and as the nature and degree of their offence shall deserve.

Synod.

General council.

1. GENERAL or œcumenical councils or synods are assemblies of bishops from all parts of the church, to determine some weighty controversies of faith or discipline. These were first called by the emperors, afterwards by christian princes; till in the latter ages the pope usurped to himself the greatest share in the calling of them, and by his legates presided in them when called. *Johns.* 139.

By *Art.* 21. General councils may not be gathered together, without the commandment and will of princes; and when they be gathered together (forasmuch as they be an assembly of men, whereof all be not governed with the Spirit and word of God) they may err, and sometime have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary to salvation, have neither strength nor authority, unless it may be declared that they be taken out of holy scripture.

But since the great divisions of christendom, especially in the western church, a free universal synod is scarcely now to be hoped for. *Johns.* 140.

National synod.

2. A national synod consisteth of all the archbishops and bishops within one nation, assembled together to determine any point of doctrine or discipline. The first of this sort which we read of here in England, was that of Herudford (now Hartford) in the year 673. The last was that held by cardinal Pole, in the year 1555. *Johns.* 139.

But although national synods be now laid aside, yet upon any great emergency, the synods of the two provinces of Canterbury and York do act by mutual correspondence and joint consent, or by having commissioners from the province of York present in that of Canterbury. *Id.* 140.

Provincial synod.

3. A provincial synod consisteth of the metropolitan and the bishops subject to him; being what is now called the *Convocation*, and is treated of in this book under that title.

[398] Diocesan synod.

4. A diocesan synod is the assembly of the bishop and his presbyters, to enforce and put in execution canons made by general councils, or national and provincial synods, and to consult and agree upon rules of discipline for themselves. And

these were frequently held, while the bishop and clergy lived together in a community; and were not wholly laid aside, till by the act of submission, 25 *H.* 8. *c.* 19. it was made unlawful for any synod to meet, but by royal authority. *Johns.* 140.

Synodals.

SYNODALS and *synodaticum*, by the name, have a plain relation to the holding of synods, but there being no reason why the clergy should pay for their attending the bishop in synod, pursuant to his own citation, nor any footsteps to be found of such a payment by reason of the holding of synods, the name is supposed to have grown from this duty being usually paid by the clergy when they came to the synod. And this in all probability is the same which was antiently called *cathedraticum*, as paid by the parochial clergy, in honour to the episcopal chair, and in token of subjection and obedience thereto. So it stands in the body of the canon law, "No bishop shall demand any thing "of the churches but the honour of the *cathedraticum*, that is, "two shillings" (at the most, saith the gloss, for sometimes less is given). And the duty which we call *synodals* is generally such a small payment: which payment was reserved by the bishop, upon settling the revenues of the respective churches on the incumbents: whereas before, those revenues were paid to the bishop, who had a right to part of them for his own use, and a right to apply and distribute the rest to such uses, and in such proportions, as the laws of the church directed. *Gibs.* 976.

Synodals are due of common right to the bishop only: So that if they be claimed or demanded by the archdeacon, or dean and chapter, or any other person or persons, it must be upon the foot of composition or prescription. *Id.*

And if they be denied where due, they are recoverable in the spiritual court: And in the time of archbishop Whitgift, they were declared, upon a full hearing, to be spiritual profits; and,
[399] as such, to belong to the keeper of the spiritualities *sede vacante.* *Gibs.* 977.

Also constitutions made in the provincial or diocesan synods, were sometimes called *synodals;* and were in many cases required to be published in the parish churches: in which sense the word frequently occurreth in the ancient directories.

Templars. See Monasteries.
Temporalities (of bishoprics.) See Bishops.
Tenths. See First fruits.

Terrier.

BY *Can.* 87. The archbishops and all bishops within their several dioceses, shall procure (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, and portions of tithes lying out of their parishes, which belong to any parsonage, vicarage, or rural prebend, be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister to be one; and to be laid up in the bishop's registry, there to be for a perpetual memory thereof. (1)

It may be convenient also, to have a copy of the same exemplified, to be kept in the church chest. *God. Append.* 12.

These terriers are of greater authority in the ecclesiastical courts, than they are in the temporal; for the ecclesiastical courts are not allowed to be courts of record: and yet even in the temporal courts these terriers are of some weight, when duly attested by the register. *Johns.* 242.

Especially if they be signed, not only by the parson and churchwardens, but also by the substantial inhabitants; but if they be signed by the parson only, they can be no evidence for him; so neither (as it seemeth) if they be signed only by the parson and churchwardens, if the churchwardens are of his nomination. But in all cases they are certainly strong evidence [400]
against the parson. *Theory of Evidence*, 45. (*a*)

(1) Ecclesiastical terriers or surveys of the temporal rights of the clergyman in every parish made by virtue of this canon, are to be kept in the bishop's register office, as above directed. Per *Macdonald* C. B. in *Miller* v. *Foster*, *Gwm.* 1406. They become terriers by being thus restored to the bishop, *Potts* v. *Durant*, 3 *Anst. R.* 789. *Gwm.* 1450. The three legitimate repositories of terriers and of rectors' and vicars' books, are the registry of the bishop or archdeacon of the diocese, and the church chest. *Armstrong* v. *Hewitt*, 4 *Pri. R.* 216. And *semb.* the originals must be produced; for copies of lost terriers were in a late case held inadmissible in evidence. *Leathes* v. *Hewitt*, 4 *Pri. R.* 364. See *contra*, *Atkins* v. *Halton*, *Gwm.* 1406.; where a copy from the parish registry was admitted, as the original could not be found. 2 *Anstr.* 386. They are the highest evidence against those signing them, almost paramount to usage. Per *Richards* C. B. *Drake* v. *Smith*, 5 *Pri. R.* 380.; but not conclusive. *Blundell* v. *Maudsley*, 15 *East*, 641. *Lake* v. *Skinner*, 1 *J. & W. Rep.* 20. Tithes of particular articles mentioned in them as payable, are generally payable in kind; and any statement therein of a mode of rendering the tithe is evidence of that fact, and is allowed to qualify the render, and in a great measure to define its legal character. *Drake* v. *Smith*, 1 *Dan. R.* 114. *Halse* v. *Eyston*, 4 *Pri. R.* 419.

(*a*) So ruled by the court of king's bench in *Miller* v. *Foster*, 1794, contrary to the opinion of *Macdonald* Ch. B. 1 *Anstr.* 387. *Gwm.* 1483. See also *Atkyns* v. *Hatton*, *ib.*

[Imperfect terriers, signed by churchwardens only, are now uniformly received in evidence, being signed by persons uninterested, whose duty it was officially to sign them. (2) *Wood* B. has explained this rule as only applying where they concern the parish generally. (3) In *Mytton* v. *Hains* (3) it was held, that old terriers recording that tithe of hay is payable in kind, signed by rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to be established by proof of a money payment having been uniformly rendered within living memory, and in the absence even of reputation that the tithe had ever been taken in kind; and that although such terriers are not proved to have been signed by any person interested in the farm. But *Wood* B. differed on this point, saying they ought to have been signed by some of the persons from whom the land owner derived title: that they would certainly not be admitted as against a rector or vicar, unless signed by them or some of their predecessors (4); and that the signature of other parishioners could not make a terrier admissible to affect a *farm* modus.

Form of a terrier.

A true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, portions of tithes, and other rights, belonging to the vicarage and parish church of Orton, otherwise Overton, in the county of Westmoreland, and diocese of Carlisle, now in the use and possession of Richard Burn, clerk, vicar of the said church; taken, made, and renewed according to the old evidences and knowledge of the ancient inhabitants, this tenth day of November, in the year of our Lord one thousand seven hundred and forty nine, by the appointment of the right reverend father in God Richard lord bishop of Carlisle, at his primary visitation held at Appleby in the said county, and diocese aforesaid, the eighth day of June in the same year, and exhibited before the reverend and worshipful John Waugh, doctor of laws, chancellor of the aforesaid diocese, on the twentieth day of November in the year aforesaid.

Imprimis. One stated dwelling-house, in length fifty-one feet, in breadth nineteen feet, within the walls. One thatched barn,

(2) *Illingworth* v. *Leigh*, *Gwm.* 1615.

(3) *Mytton* v. *Hains*, 3 *Pri. R.* 24. See *Bul. N. P.* 248. *Drake* v. *Smith*, 5 *Pri. R.* 380.

(4) 3 *Pri.* 24. *Gwm.* 1615. is *contra*; but if signed in absence of the parson it gives it more weight as evidence in his favour. Per *Richards* C. B. 5 *Pri. R.* 380.

stable, cow-house, and peat-house, contiguous to each other under the same roof; in length eighty-one feet, in breadth twenty-one feet, without the walls. One other little stable, in length thirteen feet, in breadth twelve feet and an half; adjoining to the peat-house at the south-west side and end. *Item*, The church-yard, containing three roods and nineteen perches; adjoining to the grounds of Robert Teasdale on the south, of Richard Alderson on the west and north, and to a close belonging to the said vicarage, called Prior Garth, on the east: The walls and gates thereof round about made by the parish. *Item*, One inclosure called Prior Garth, containing three roods and seven perches; adjoining to the church-lane on the south, to the church-yard on the west, to the ground of Richard Alderson on the north, and to the highway on the east; through which there lies a footpath from the vicarage-house to the church, but for no other purpose: The wall and hedge on the south, north, and east, made by the vicar; and on the west, where it adjoins to the church-yard, by the parish. *Item*, One garden, containing one rood and eleven perches; adjoining to the vicarage garth, and to the ends of the barn and of the dwelling-house, on the south; to the highway, on the west and north; and to the said garth, on the east: The fence round about made by the vicar. *Item*, One parrock, containing twenty-four perches and an half; adjoining to Orton Green on the south, to the highway on the west, to the end of the dwelling-house on the north, and to the vicarage garth on the east: The fence round about made by the vicar. *Item*, One garth, containing one acre, fifteen perches and an half; adjoining to the grounds of John Powley, Daniel Teasdale, and Orton Green on the south; to the said parrock, barn, and garden on the west; to the peat-house end, garden, and highway on the north; and to a close belonging to the said vicarage, called Corn Close, on the east: The fence round about made by the vicar, except that John Powley makes the fence where it adjoins to his ground, and Daniel Teasdale from thence to the bottom of the old lime-kiln; through which garth lies a foot-path for the said John Powley and Daniel Teasdale to and from their said grounds, and likewise a driving way for their sheep; which they frequented whilst the common field was uninclosed, but is now become almost useless. *Item*, One inclosure, called Corn Close, containing one acre, one rood, and twenty-one perches; adjoining to the said John Powley's lane, and to a place of ground before his barn called a flee-room, and to his garth, on the south; to the vicar's said garth on the west; to the highway on the north; and to the highway and John Powley's lane on the east: The fence all about made by the vicar, except where it adjoins to John Powley's garth and barn. All which said corn, close, garth, garden, and parrock, have been inclosed ground for time imme- [401]

morial, and the vicar in respect thereof hath not repaired any part of the highways adjoining thereunto. Opposite to the same, on the north side, is an inclosure made by Daniel Teasdale, about nine years ago, by which the highway was made into a lane. *Item,* One inclosure called Fore Dale, containing three acres and fifteen perches, adjoining to the grounds of Robert Teasdale and John Nelson on the south, of John Nelson on the west, of John Powley and Robert Teasdale on the north, and of Robert Teasdale on the east: All the fence made by the vicar, except where it adjoins to the said John Nelson's in-croft, and except half the length of the said John Nelson's out-croft, from the middle to the east end, the said John Nelson's fence being stone-wall; from the east end of which inclosure lies a way
[402] through Robert Teasdale's ground, which the present incumbent purchased of the said Robert Teasdale, to an inclosure belonging to the said vicar (but not to the vicarage,) called Long Roods; which is to continue for ever, and may be of use if at any time hereafter the said two inclosures (Fore Dale and Long Roods) shall be occupied by the same person, or otherwise. *Item,* One other inclosure, called the Greater Mil-brow, containing one acre, three roods, and seven perches; adjoining to the ground of John Powley on the south, to a tillage way enjoyed and repaired by the said vicar on the west, to the ground of Thomas Ireland on the north, and of John Powley on the east: All the fence made by the vicar, except about sixteen yards of stone wall at the north-east end, belonging to John Powley. *Item,* One other inclosure, called Little Mil-brow, containing twenty-eight perches; adjoining to the ground of John Powley on the south, of Isabel Atkinson on the west, of Isabel Atkinson and Thomas Ireland on the north, and the said tillage way on the east: The fence all made by the vicar; through the south-west corner of which inclosure is the ancient watercourse. The said three last inclosures were made out of the common field by the present incumbent. *Item,* One other inclosure called Glebe Close, lying at Firbiggins, containing eight acres and three roods; adjoining to the ground of Elizabeth Turner on the south, of Elizabeth Turner and William Thwaytes on the west, of William Thwaytes on the north, and to the common on the east: The wall at the east end is made by the vicar, at the west end by Elizabeth Turner and William Thwaytes: The right of repairing the fence on the north side, and on the south side is in dispute, and not yet determined. At the end of Elizabeth Turner's house, an oak gate is to be maintained by the owners of Coat Garth; for which they enjoy a liberty of ingress and egress for themselves and families, and liberty of driving cattle in the winter, from Martinmas to Lady-day, doing as little damage as may be; and of passing with peats or other firing in summer. Belonging to

the said glebe close; and occupied therewith, there is likewise a parcel of ground, leading from the said gate at Elizabeth Turner's house-end, northeastward to the said glebe close, having the wall on the left end, and meted out from Elizabeth Turner's ground on the right, in breadth three yards or upwards, being the way to and through the said glebe close. *Item,* Another parcel of ground, in the common field, called North Lands, containing two roods and five perches; adjoining to the ground of Robert Teasdale on the south, of John Nelson on the west and north, and of Robert Teasdale on the east. *Item,* Another parcel of ground in the common field, called Pot-lands Head, containing one rood; adjoining to the ground of Robert Teasdale on the south, of Elizabeth Waller on the west down by the runner, of John Nelson on the north, and of Robert Teasdale on the east. All which said lands, containing in the whole nineteen acres and upwards, are situate within the lordship and manor of Orton, free from the payment of any fines, rents, or services to any chief lord: the royalties of which said lands are also in the vicar. *Item,* a parcel of peat-moss in Orton low moor, containing by estimation ten acres, known by the name of the Vicar's Moss. [403]

Item, To the said vicarage is also belonging the tithe of wool throughout the parish; and the manner of tithing is this: The owner lays his whole year's produce in five parcels or heaps; the vicar, or person employed by him, chooseth one of the five heaps, which he pleaseth, and divides the same into two parts; of which two parts the owner chooseth one, and leaves the other to the vicar for his tenth part. *Item,* The tithe of lambs in their proper kind throughout the parish; and the custom concerning them is this: If a person's number is one, he pays a penny; if two, he pays two-pence; if three, he pays three-pence; if four, he pays four-pence; if five, he pays half a lamb; if six, a whole lamb, the vicar paying back four-pence; if seven, three-pence; if eight, two-pence: if nine, one-penny; if ten, the vicar hath a lamb complete: And in like manner for every number above ten. And if a man's number is under fifty, the tithe is taken thus: The owner takes up two, then the vicar takes one; next the owner takes nine, then again the vicar one; and so on till the vicar hath taken the number due to him: if they are fifty, or upwards, they are put into a place together, and run out singly through a hole or gap; the two first that come out are the owner's; the third the vicar's; then the owner hath the next nine; then the vicar one; and so on till the vicar hath his number. And if sheep are sold in the spring, the tithe of lambs is paid by the person with whom they were lambed, whether seller or buyer. *Item,* The tithe of geese, taken up about Michaelmas, in the same manner as the lambs; except that whereas a penny

is paid on the account of each odd lamb, an halfpenny only is paid for each odd goose. *Item*, The tithe of pigs in like manner. *Item*, The tithe of eggs about Easter; two eggs for each old hen and duck, and one egg for each chicken and duck of the first year. *Item*, By every person who sows hemp, is paid yearly one penny. *Item*, For each plough is paid yearly one penny. *Item*, By every person keeping bees is paid yearly one penny. *Item*, An oblation of four-pence at every churching of women. *Item*, For every wedding, by publication of banns, one shilling; by license, ten
[404] shillings. *Item*, For every funeral (without a sermon) six-pence. *Item*, Mortuaries, according to act of parliament. *Item*, For every person of age to communicate, three halfpence yearly, due at Easter. *Item*, A pension of twenty shillings yearly out of the rectory of Sedburg in the county of York. —— The glebe, tithes, and profits of the vicarage, are worth at the improved value, *communibus annis*, about ninety pounds a year.

There is also due to the parish clerk: For every family keeping a separate fire, three pence yearly. For every wedding by publication, or by licence, one shilling. For every funeral, six-pence. For every proclamation in the church-yard, two-pence.

To the sexton for making a grave six-pence.

Belonging to the said parish —— are, first the parish church, an ancient building, containing in length (with the chancel) ninety-six feet, in breadth forty-eight feet: The chancel in breadth one part thirty feet, the other part twenty-one feet. The steeple fifteen feet, square within the walls; in height sixty feet. Within, and belonging to which, are: One communion-table, with a covering for the same of green cloth. Also one linen cloth for the same, with two napkins. Two pewter flaggons. Two silver chalices, weighing about ten ounces each. One paten. One bason for the offertory. One table of degrees. One chest with three locks, in the vestry; of little use because of the damp. One pulpit and reading-desk, made in the year 1742. One pulpit cushion, covered with green cloth. One large Bible of the last translation. Two large common prayer books. The book of homilies. Comber on the Common Prayer, and Tillotson's first volume of sermons, given by Mr. Thomas Hastwell, merchant in London, 1703. The king's arms, with the ten commandments. One church clock. Four bells with their frames: The first, or least bell, being two feet seven inches and an half in diameter; with this inscription, [Jesus be our speed, 1637]: The second, two feet and eleven inches in diameter, with an ancient inscription [*omnium animarum*], perhaps by a mistake of the bell-founder for [*omnium sanctorum*], to whom the church is dedicated: The third, three feet and two inches in diameter, with this inscription, [*soli Deo gloria*, 1637]: The fourth, or largest, three feet six inches and an half in diameter; with this

inscription, [Mr. Thomas Nelson, vicar. John Bowness, John Winter, 1711.] Two biers. One herse-cloth. Two surplices. Three parchment register books; one, beginning in 1596, and ending in 1646, imperfect; the second, beginning in 1654, and ending 1743, complete; the third beginning 1743, and continued to the present time. The seats in the church and chancel (ex- [405]
cept the vicar's pew) have been repaired for time immemorial at the public expence of the parish. There are also several new common seats erected this year by the churchwardens, at the low end of the church adjoining to the belfry.——There is also belonging to the said parish, the rectory thereof, together with the tithes of corn, hay, calves, milk, and other dues, which did formerly belong to the priory of Conieshead in Lancashire, and after the dissolution of monasteries were purchased by the inhabitants.——Also the advowson of the vicarage, which did belong to the said priory, and was likewise purchased with the rectory.——Also one box with three locks, in the keeping of John Unthank of Orton; in which are the purchase deeds of the rectory and advowson; a copy of the endowment of the vicarage in 1263; the purchase deeds of the manors of Orton and Raisbeck by the inhabitants; bounder rolls, and other public writings.—— There is also belonging to the said parish, one inclosure in the lordship of Raisbeck, called Barrough Close, containing by estimation fifteen acres, of the yearly rent of six pounds: adjoining to the river Lune on the south, to the ground of Thomas Fothergill on the west, to the common on the north, and to the grounds of Leonard Scaife on the west: The fence on the south made by the parish; on the west by the parish and Thomas Fothergill, each a part; on the north, by the parish; and on the east by the parish and Leonard Scaife, each a part.——Also the sum of twenty pounds, in the hands of Thomas Winter, of Wood-end, given by John Dalston, esq. of Acornbank. Also the sum of three pounds ancient poor stock, in the hands of the administrators of the late George Overend of Raisbeck. Also the sum of ten pounds, now in the hands of the vicar, given by Daniel Wilson, esq. of Dalham Tower. Also the sum of five pounds, in the hands of Mr. Edward Branthwaite of Carlingill, given by him towards a fund for the poor stock. Also the sum of five pounds, in the hands of Thomas Hodgson of Tebaygill Edge, given by Mr. Robert Harrison of Low Scailes, deceased, for the same purpose. The interest of which money, and the rent of which inclosure, are applied by the churchwardens and overseers of the poor, by the direction of the twelve, to the relief of the poor, and defraying other parish charges. Which said twelve men are chosen yearly in Easter week, at a vestry meeting, by a majority of votes, to be sidesmen, and a select vestry for the year ensuing.

There are also three schools in the said parish. One at

Orton, lately built by the inhabitants, and endowed by Agnes Holme of Orton, widow, with a parcel of land lying in Orton field, containing by estimation one acre, of the present yearly rent of ten shillings; adjoining to the grounds of Christopher Parker on the south, west, and east, and to a land belonging to the vicarage of Burgh on the north: Endowed also by Robert Wilson of Long Sleddale, yeoman, with the sum of five pounds, now in the hands of Thomas Green of Langdale.——Another school at Tebay, founded by Robert Adamson of Blacket-Bottom, in Grayrigg, gentleman, in the year 1672, and endowed by him with the estates called Ormondie Biggin and Blacket-Bottom, in Grayrigg, now of the yearly rent of sixteen pounds.——Another school at Greenholme, founded by George Gibson of Greenholme, gentleman, in the year 1733, and endowed by him with four hundred pounds original bank stock; of the yearly produce of about twenty-two pounds.

In testimony of the truth of the before-mentioned particulars, and of every of them; we, the minister, churchwardens, and principal inhabitants, have set our hands the tenth day of November, in the year of our Lord one thousand seven hundred and forty-nine.

Ri. Burn, vicar.

Joseph Powley
John Bowness
Edmund Dent
Stephen Matthews
George Wilson
Will. Rowlandson
} Churchwardens.

John Unthank
John Nelson
John Bowness
Robert Bowness
John Wilson
Jonathan Whitehead
Edward Branthwaite
Thomas Brown
John Wilson
William Atkinson
John Farrer
} Eleven of the Twelve, one of them being dead.

Note. In 2 *Dugd. Monast.* 424. there is a copy of a charter of king Edward the second, confirming (amongst others) a grant which had been made to God and saint Mary and the house of *Conyngesheved* and the confreres there, by Gamellus de Penigton, of the churches of Penigton and Molcastre, with their chapels and other appurtenances, and of the church of Wytebec, and of the

church of *Skerovierton*, so denominated from the Islandic *skier*, a scar, or rock, (which word is still in use in the county of Lancaster): the town of Orton being situate under the mountain which still beareth the name of Orton-Scar.

Note. *Conynges-heved* is the same as the *king's head*; from the Saxon *cyning*, or *conyng*, which signifieth king; and *heafod*, head.

[Terriers alone without any evidence are not sufficient to prove a modus. *Lake* v. *Skinner*, 1 *Jac. & Walk. R.* 9.]

Tithes.

OBLATIONS, offerings, prestations, pensions, and other church dues not properly tithes, are treated of under their repective titles.

I. *Origin of Tithes in England.* (*Page* 407.)

II. *Of the several kinds of tithes, with their nature and properties.* (*Page* 408.)

III. *Of what things tithes shall be paid; and therein of exemptions and discharges from tithes.* (*Page* 411.)

IV. *Of moduses, or exemptions from payment of tithes in kind; and therein of custom and prescription.* (*Page* 431.)

V. *Of the several particulars tithable.* (*Page* 461.)

VI. *Of* [*tithing in general: and of*] *the setting out, and the manner of taking and carrying away of tithes.* (*Page* 521.)

VII. *Tithes how to be recovered.* (*Page* 526.)

VIII. *Tithes in London.* (*Page* 551.)

I. *Origin of tithes in England.*

What was paid to the church for several of the first ages after Christ, was all brought to them by way of offerings; and these were made either at the altar, or at the collections, or else occasionally. *Prideaux on Tithes*, 139.

Afterwards, about the year 794, Offa king of Mercia (the most potent of all the Saxon kings of his time in this island) made a law, whereby he gave unto the church the tithes of all his kingdom; [408]

which, the historians tell us, was done to expiate for the death of Ethelbert king of the East Angles, whom in the year preceding he had caused basely to be murdered. *Prideaux on Tithes*, 165.

But that tithes were before paid in England by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of Egbert archbishop of York about the year 750; and from an epistle of Boniface archbishop of Mentz, which he wrote to Cuthbert archbishop of Canterbury about the same time; and from the seventeenth canon of the general council held for the whole kingdom at Chalchuth, in the year 787. But this law of Offa was that which first gave the church a civil right in them in this land by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. *Id.* 167.

Yet this establishment of Offa reached no further than to the kingdom of Mercia, over which Offa reigned; until Ethelwulph, about sixty years after, enlarged it for the whole realm of England. *Id.*

II. *Of the several kinds of tithes, with their nature and properties.*

What are tithes; and division thereof into prædial, mixt, and personal.

1. [Tithes are the tenth part of the produce arising from land, from the stock upon land, and from the personal industry of the inhabitants; and] with regard to the several kinds or natures, are divided into *prædial*, *mixt*, and *personal*:

Prædial tithes are such as arise merely and immediately from the ground [either with or without the intervention of human industry]; as grain of all sorts, hay, [hemp, flax,] wood, fruits, herbs: for a piece of land or ground being called in Latin *prædium* (whether it be arable, meadow, or pasture), the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce is called a *prædial* tithe. *Wats. c.* 49. 2 *Inst.* 649. (5)

Mixt tithes are those which arise not immediately from the ground, but [which are produced mediately through the increase or other produce of such animals as receive their nutriment from the earth and its fruits], as colts, calves, lambs, chickens, [pigs, wool] milk, cheese, eggs. *Wats. c.* 49. [3 *Salk.* 347.]

Personal tithes are such profits as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negociation; being the tenth part of the clear gain, after charges deducted [as of mills and fish]. *Wats. c.* 49. (6)

(5) See cases, *Mirehouse on Tithes*, 1.

(6) 2 *Inst.* 621. 2 *P. Wms.* 462. *Dandridge* v. *Johnson*, *Cro. Jac.* 523. 1 *Roll. Ab.* 656.

2. Tithes, with regard to value, are divided into *great* and *small*. Division of tithes into great and small tithes.

Great tithes; as corn, [peas, and beans,] hay, and wood. (7) *Degge, part* 2. *c.* 1.

Small tithes; as the prædial tithes of other kinds, together with those which are called mixt, and personal. *Gibs.* 663. [2 *Wood's Inst. L. E.* 162. 2 *Woodd. V. L.* 229.]

But it is said, that this division may be altered; *First*, By custom; which will make wood a small tithe, under the general words *minutæ decimæ*, in the endowment of the vicar. (7) *Secondly*, By quantity; which will turn a small tithe into great, if the

(7) *Sims* v. *Bennett*, *Gwm.* 874. See *Tildell* v. *Walker*, 1 *Mod.* 50. 3 *Salk.* 378. In which cases *wood* is considered as *small* tithe; but the endowment being lost, was held payable by *custom* to the rector.

The endowments of vicarages in consequence of the statutes 15 *R.* 2. *c.* 6. and 4 *H.* 4. *c.* 12. (see Appropriation, II.), have usually been by a portion of the glebe or land belonging to the parsonage, and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are therefore generally called priory or small tithes; the greater or prædial tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. As all the tithes or dues of the church of common right belonged to the rector or to the appropriator, the vicar is only entitled to that portion which is expressed in his endowment, or which his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. And where there is an endowment, he may in general recover all that is contained in it; and may still retain what he and his predecessors have enjoyed by prescription, though not expressed in it: for such a prescription amounts to evidence of another consistent endowment. But Mr. *Christian* says, he has heard Ch. *Eldon* declare, that if a vicar enjoys property not mentioned in an endowment, and has never within time of memory possessed what is expressly contained in it, a jury might presume that he had the former *in lieu* of the latter. Disclaimer by rector of all small tithes, except certain articles, vests all the other, not excepted small tithes, in the vicar, and this though his title to some of the latter as *agistment* may be doubtful: for when the title is general, with only certain express exceptions beyond which the rector is not proved to be entitled, the evidence of perception must be considered as applying to all, and the vicar be presumed *to have been endowed* of all the other small tithes. *Leathes* v. *Newitt*, 4 *Pri. R.* 374. Thus a vicar established his right to tithe of *hay* by proof of perception as far back as *living memory*, in absence of all evidence of perception by the rector, on the presumption of a subsequent endowment to that in which it was *expressly* stated to belong to the rector. On the other hand, where the vicar relied on an endowment in 1257 of the tithe of hay, but proved no perception thereof, which had always been had by the impropriator, the court presumed a grant of that tithe into lay hands before the restraining

parish is generally sown with it. *Thirdly*, By change of place; which makes the same things, as hops in gardens small tithes, in fields great tithes. (8) But this seems to be contradicted in the case of *Wharton* v. *Leslie*, *E. 5 W.*, where the tithe of flax, though sown in great fields, was adjudged to the vicar as a small tithe; Holt chief justice (who was of another opinion) being absent. 4 *Mod.* 184. *Gibs.* 663. [3 *Salk.* 349.]

And Dr. Watson is of opinion, that the quantity of land within any parish sowed with any thing, cannot make the tithe of another nature; and that what is called small tithes, seemeth to be in respect of the thing itself, and not from the small quantity of land sowed therewith, whereby the tithes thereof are but small, and of little value; for if that were to be the rule to determine what shall be said to be small tithes, then corn and hay in some places might be accounted small tithes. *Wats. c.* 39.

And according to this latter opinion the law is now settled; namely, that the tithes are to be denominated great or small tithes, according to the nature and quality thereof, and not according to the quantity. (9) As in the case of *Smith* v. *Wyat*, July 21. 1742. (*b*) A bill was brought by the rector of a parish in Essex for the tithe of potatoes sown in great quantities in the common fields, and therefore claims it as a great tithe. The defendant, the vicar insists, that notwithstanding it is sown in fields, it still continues a small tithe, and the quantity makes
[410] no difference. By the lord chancellor *Hardwicke*: The question is, whether potatoes planted in fields are great or small tithes. Potatoes in their nature are small tithes: then the question will be, whether they receive any alteration of their right, by cultivating in greater or smaller quantities. When the distinction of

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statutes. *Dartmouth* (Countess) v. *Roberts*, 16 *East*, 334. Perception for length of time, carried as far back as living memory, founds a presumption that it existed long anterior, unless contradicted by evidence: otherwise an endowment or other instrument could never be presumed in any case by force of usage. *Parsons* v. *Bellamy and others*, 4 *Pri. R.* 190. See also *Leathes* v. *Newitt*, 4 *Pri. R.* 379. "Perception and long enjoyment is the vicar's common-law proof." Per *Graham* B. in *Butler* v. *Michel*, 2 *Pri. R.* 450. Usage is the broad ground of presumption in favour of the vicar's endowment. *Williams* v. *Price and others*, 4 *Pri. R.* 156.

(8) As in *Norton* v. *Clark*, *Gwill.* 428. contradicted in *Crouch* v. *Risden*, 1 *Ventr.* 61. 1 *Sid.* 443. 2 *Keb.* 612. *Franklyn* v. *St. Cross*, *Bunb.* 78.

(9) *Sims* v. *Bennet*, 7 *Bro. P. C.* 29. ed. by *Tomlins*. 1 *Ed. Rep.* 382. *Wharton* v. *Leslie*, 3 *Salk.* 349. *Moseley*, 909.

(*b*) This doctrine is also recognised by Ch. B. *Comyns*, in the case of *Wallis* v. *Pain* and *Underhill*, *Com. Rep.* 633. *Bunb.* 344. And in *Sims* v. *Bennet*, in *Dom. Proc.* 1762. 5 *Bro. P. C.* 586. [7 *id.* 29. 1 *Eden.* 382. and *infra*, v. 7.]

great and small tithes was at first settled, probably it was upon this foundation, that the former yielded tithes in greater quantities, and the species of tithes which were called small produced but in small quantities: though it might be arbitrary at first, yet it hath grown into a rule, and fixed so for the sake of certainty. If this sort of roots should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish. If the quantity will turn small tithes into great, why will it not turn great tithes into small, when the quantity of great tithes is but small? Upon the whole, his lordship was of opinion, that the tithe of potatoes, in whatever quantity, is a small tithe; and decreed accordingly. 2 *Atk.* 364. (1)

[The nature of crops (says Mr. Mirehouse) admits of a definite description, their quantity is always liable to dispute, therefore the law which aims at certainty adopts the above mentioned rule; and in direct subservience to it, it seems now settled, though in opposition to some respectable authorities (2), that all personal and mixed tithes, as well as hops (3), flax (4), potatoes (5), turnips (6), herbs, apples, and fruit (7), coleseed (8), clover when left for seed, and other seeds (9), rape seed (1), saffron (2), woad (3), teazels (4), thyme and tobacco (5), are small tithes, however large the quantity in which they are cultivated. (6)]

(1) The inquiry is therefore to be confined to the question 'Whether the nature of the thing remains the same?' for on that alone the rule depends. And see *Gurley* v. *Birt*, *Bunb. R.* 169. *Steers* v. *Brassier*, *Gwm.* 742. *Hodgson* v. *Smith*, *Bunb.* 279.

(2) *Udall* v. *Tindall*, *Cro. Car.* 28. *Hutt. R.* 77. *Wharton* v. *Lisle*, 3 *Lev.* 365. *Skinn. R.* 341. 356

(3) *Crouch* v. *Risden*, 1 *Vent. R.* 61. 1 *Sid.* 443. 2 *Keb.* 612. *Franklyn* v. *Master and Brethren of St. Cross*, *Bunb. R.* 78. superseding *Norton* v. *Clerk*, *Gwill.* 428.

(4) *Wharton* v. *Lisle*, 4 *Mod.* 184. 12 *Mod.* 41. *Skinn. R.* 341.

(5) *Smith* v. *Wyatt*, supra.

(6) *Beaumont* v. *Shilcot*, *Gwm.* 944.

(7) *Lister* v. *Foy*, *Gwm.* 579.

(8) *Fish* v. *Wimberley*, *Gwm.* 533.

(9) *Wallis* v. *Pain*, 2 *Com. R.* 634. *Bunb.* 344. *Pomfret* v. *Lauder*, *Gwm.* 530.

(1) *Robinson* v. *Brooke*, *Gwm.* 471.

(2) *Bedingfield* v. *Peak*, *Cro. El.* 467. *Moor.* 909. 1 *Rol. Abr.* 643. *Case of Dean and Chapter of Norwich*, *Ow. R.* 74. *Gouldbs. R.* 149.

(3) *Udall* v. *Tindall*, *Cro. Car.* 28. 2 *Com. R.* 633.

(4) *Hunt* v. *Codrington*, 1 *Wood's Dec.* 391.

(5) *Knight* v. *Halsey*, *Gwm.* 1557.

(6) On this principle, tithe of *seed tares* was held to be a great tithe, and to pass to the grantee of a rectory under the words, "*decimas garbarum*," as they are rather leguminous plants than seeds newly introduced, which are small tithes. *Daws* v. *Benn and Another*, 1 *B. & Cress. R.* 751.

Tithes restrained to the proper parish.

3. It is said by lord *Coke* and many others, that before the council of Lateran in the year 1180, a man might have given his tithes to what church or monastery he pleased.

But this Dr. *Prideaux* doth utterly deny, for two reasons: 1. Because of the absurdity of the thing; for all the laws which had been made for tithes would have signified nothing, if no one had been certainly invested in a right to them; for in such case no one could claim them, and in case of non-payment no one could make process in law for them; and consequently no one having a special right to demand them, it must have followed in practice, that what was thus paid to every spiritual person, would in fact and reality be paid to none at all. 2. Because before the said council there were in this land many appropriations, whereby the tithes of whole parishes were assigned to convents or other spiritual corporations: all which would have signified nothing, if the parishioners had been at liberty to pay their tithes to what spiritual person they should think fit.

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But be that as it will, it is certain that now tithes of common right do belong to that church, within the precincts of whose parish they arise. (6)

Portion of tithes within another parish.

4. Yet notwithstanding, one person may prescribe to have tithes within the parish of another; and this is what is called a *portion of tithes*. *Gibs.* 663.

One reason of which might be, the lord of a manor's having his estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place.

But whatever original these portions might have, they are in law so distinct from the rectory, that if one who hath them do purchase the rectory, the portion is not extinct, but remaineth grantable. But as to the cognizance thereof, the case being between parson and parson, and concerning a spiritual matter, that belongs, like the cognizance of other tithes, to the ecclesiastical court. *Gibs.* 663. (*c*)

(6) This regulation, corresponding with the ancient law of the land, was enjoined by a decretal epistle of Innocent the Third to the archbishop of Canterbury, in the year 1200. See 2 *Inst.* 641., and 2 *Bl. Com.* 27. [In *Warrington* v. *Mothersill and others*, 7 *Pri. R.* 666. Bill for tithes. A negative plea that defendant, since the day mentioned, had never occupied lands in the parish, was allowed, for there is no analogy between pleas at law and in equity: The object of every plea in bar in equity being to shew there is no foundation for the suit, the effect of this plea is to bring the case to a single material point. Defendant must prove himself living out of the parish, and the general description of him in the bill, as of another parish, is not sufficient. *Lake* v. *Skinner*, 1 *Jac.* & *Walk.* 214.]

(*c*) 1 *Roll.* 161. If a portion of tithes be possessed for 150 years,

5. Tithes extra-parochial, or within the compass of no certain parish, belong to the crown. By the canon law they were to be disposed of at the discretion of the bishop; but by the law of England all extra-parochial tithes, as in several forests, do belong to the king, and may be granted to whom he will. (7) And accordingly they have been actually adjudged to him, not only by several resolutions of law, but also in parliament, in the case of the prior and bishop of Carlisle, in the 18th of Edward the first, concerning tithes in Inglewood forest; to wit, that the king in his forest aforesaid may build towns, assart lands (or make them fit for tillage), and confer those churches, with the tithes thereof, at his pleasure, upon whomsoever he pleaseth; because that the same forest is not within the limits of any parish. 1 *Roll's Abr.* 657. 2 *Inst.* 647. [*Infra*, III. 6.]

Tithes in extra-parochial places.

In the case of *Parry* v. *Gibbs*, it was held, that under a grant of tithes arising from lands *de novo assartatis et assartandis* within the extra-parochial parts of a forest, the grantee was not entitled to the tithes of those lands in the occupation of the keepers of the forest, nor of lands inclosed by a private person by encroachment upon the forest. 4 *Gwill.* 1400.

[Tithes have every property of an inheritance in land, except that they lie in grant (8), and not in livery; and therefore if lessee of tithes covenant, for him and his assigns, that he will not let any of the farmers in the parish have any part of the tithes, this covenant runs with the tithes, and binds the assignee against whom the action is brought for breach of covenant. (9)]

Tithes lie in grant.

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or for such a length of time as to make the right doubtful, a court of equity will not assist the plaintiff by directing an issue, but he must establish his right at law. *Scot* v. *Airey*, 1779, cited in 1 *Anst.* 311. Where a portion of tithes had been possessed for 250 years by the owners of the lands, the court presumed a grant of them before the 18 *Eliz.* though *tithes* were not specifically mentioned in the title-deed under which the lands were claimed. *Oxenden*, bart. v. *Skinner*, 4 *Gwill.* 1513. [Again, in favour of uninterrupted enjoyment by perception of tithe hay by plaintiff and his ancestors, though an endowment of the vicarage in A. D. 1253 with the said tithe be shewn, it shall be presumed that a vicar granted it to a layman as a *portion* of tithes before the restraining statutes. *Dartmouth* (Countess) v. *Roberts*, 16 *East R.* 334.]

(7) The king is entitled *jure coronæ* to the tithe of the produce of all extra-parochial lands; and this right is not confined to such as are, strictly speaking, *forests*. The putting in charge the tithes of an extra-parochial place, in the accounts of successive auditors, is a sufficient 'standing *insuper*' within 9 *G.* 3. *c.* 16. (*nullum tempus* act), though '*nil*' had been always returned in such accounts, and the crown had neither granted leases of tithes or received any tithes within 60 years. *Att. Gen.* v. *Lord Eardley*, 8 *Pri. R.* 74.

(8) *Chave* v. *Calmel*, 3 *Burr.* 1873.

(9) *Bally*, clerk, v. *Wells*, 3 *Wils. R.* 25. 30.

III. *Of what things tithes shall be paid; and therein of exemptions and discharges from tithes.*

Things that renew yearly.

1. Of common right tithes are to be paid for such things only as do yield a yearly increase by the act of God. *Wats. c.* 46. 1 *Roll's Abr.* 641.

[412] Yet this rule admits of some exceptions; as, for instance, tithe is due of saffron, though gathered but once in three years; and concerning *sylva cædua*, there is an entry in the register, that consultations shall be granted thereof, notwithstanding that it is not renewed every year. *Gibs.* 669.

Once in the year.

2. Generally, of things increasing yearly, tithes shall be paid only once in the year. *Gibs.* 669.

But this rule also is not universally true. And it is evidently against the rule of the canon law: which requireth that if seeds be sown upon the same ground, and renew oftener than once in the year, the tithes thereof shall be paid so often as they renew. (*c*) And this seemeth still to be the law; as in the case of clover, for instance, which reneweth oftener than once in the year, tithes thereof shall be paid as often as it doth renew. (2)

Things of the substance of the earth.

3. Of common right, no tithes are to be paid of quarries of stone or slate, for that they are parcel of the freehold, and the parson hath tithes of the grass or corn which grow upon the surface of the land in which the quarry is; so also, not for coal, turf, flags, tin, lead, brick, tile, earthen pots, lime, marle, chalk, and such like; because they are not the increase, but of the substance of the earth. And the like hath been resolved of houses (considered separately from the soil), as having no annual increase. But by particular custom, tithes of any of these may be payable. 2 *Inst.* 651. 660. [*Wats. C.L.* 486. *Anon. Cro. C.* 596. *Hob. R.* 11. as *e.g.* of tithe ore. (3)]

Things *feræ naturá*.

4. By the common law of England, there is no tithe due for things that are *feræ naturá*; and therefore it hath been resolved,

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(*c*) The passage of the canon law quoted by Dr. Gibson for this opinion is a decree of *Clement* III. to be found in *X.* 3. 30. 21. *Ex parte canonicorum ecclesiæ tuæ nobis est querela proposita quod quidam agricultores, cum simul vel diversis temporibus anni, in eodem horto vel agro diversa semina sparserint, non nisi de unius illorum seminum fructibus decimas persolvunt.—Mandamus quatenus si noveris rem taliter se habere, agricultores illos ut de omnibus prædiorum fructibus decimas absque diminutione persolvant, ecclesiastica censura compellas.* But the complaint there made is for sowing different seeds in the same ground, and paying tithes of the produce of one only, and not for refusing to pay different tithes of the produce of the same seed; so that the authority does not support the position. *Vid. infra, V. II.* 2 & 3.

(2) 2 *Gwill.* 584. *infra*, 469. 4.

(3) *Buxton* v. *Hutchinson*, 2 *Vern. R.* 46.

that no tithe shall be paid for fish taken out of the sea, or out of a river, unless by custom, as in Wales, Ireland, Yarmouth, and other places: neither, for the same reason, is any tithe due of deer, conies, or the like. But if the tithe thereof be due by [413] custom, it must be paid. *Degge, p.* 2. *c.* 8. 2 *Inst.* 651. 664. [1 *Lev.* 179.]

[Hence hounds, ferrets, hawks (4), pheasants (5), partridges, though tame and kept in a place enclosed, where they lay their eggs and hatch their young ones (6); wildfowl, such as ducks, mallards, and teal, though taken in a decoy, and of profit to the owner (7); deer (8); bees (9), which, however, pay tithe of honey and wax (1); and conies, though in inclosed warrens (2), are not titheable at common law, and tithe of them is only due by custom.]

5. *By the statute of the* 2 & 3 *Ed.*6. *c.*13. (3) All such *barren* heath or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, *shall after the end and term of seven years next after such improvement fully ended and determined, pay tithe* for the corn and hay growing upon the same. § 5.

Barren land.

Provided, that if any such barren, waste, or heath ground hath before this time been charged with the payment of any tithes, and the same be hereafter improved, or converted into arable ground or meadow; the owner thereof shall, during the seven years next after the said improvement, pay such kind of tithe as was paid for the same before the said improvement. § 6.

Barren] Although it doth yield some fruit, and do pay tithes for wool and lamb, or the like, yet if it be barren land as to agriculture or tillage, which this clause meant to advance, it is within this act. 2 *Inst.* 655.

(4) *Degge, c.* 8. 260.
(5) *March, R.* 26.
(6) *Hugton* v. *Prince, Moor. R.* 599.
(7) *Att. Gen.* v. *Ld. Eardley,* 8 *Pri. R.* 81. *Camell* v. *Ward, Gwm.* 531. 1 *Wood's D.* 209.
(8) 2 *Inst.* 651.
(9) *Barfoot* v. *Norton, Cro. Car.* 559.
(1) *Anon. Cro. Car.* 404.
(2) *Nicholas* v. *Elliott, Gwm.* 1581. *Flower* v. *Vaughan, Hetl. R.* 147. *Lit. R.* 311. *Walton* v. *Tryon, Gwm.* 840. *Anon. Cro. Car.* 339. 1 *Ventr. R.* 5. *Randal* v. *Head, Hardr. R.* 188. *Towerson* v. *Wing,* 1 *Keb.* 602.
(3) A remedial act: in an action on which the court will grant a new trial for the mistake of the jury. *Selsey* (Lord) v. *Powell,* 6 *Taunt. Rep.* 297.

But yet if the ground be not apt for tillage, yet if yet be not of its own nature barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and employed thereunto: yet it shall pay tithes presently; for wood ground is fertile, and not barren. 2 *Inst.* 656. *Bunb.* 159. (4)

In the case of *Stockwell* and *Terry*, July 14, 1748, it was held by lord *Hardwicke*, that such land only is within this clause, as, above the necessary expence of inclosing and clearing, requires also expence in manuring or chalking, before it can be made proper for agriculture; and he decreed tithe to be paid, on its being proved that the land bore better corn than the arable land in the parish, without any extraordinary expence of manure. 1 *Vezey*, 115. [observed on in 2 *M. & S.* 360. to 362. *per Ld. Ellenb.*]

In a prohibition between *Sharington* and *Fleetwood*, *H.* 38 *Eliz.* for tithes in Orwell in the county of Lancaster, it was resolved, that if marsh meadow, or other land, for not cleansing of the trenches or sewers, or by sudden accident or inundation of waters, be surrounded; or by ill husbandry or unprofitable negligence, any land become overrun with bushes, furze, whins, and briers; yet are not they or any of them said to be barren land within this statute, because of their own nature they are fruitful; and the parson shall not by this act be barred of his tithes by the ill husbandry or negligence of the owner or possessor. 2 *Inst.* 656. (5)

[On the question of exemption on account of *barrenness*, the whole evidence is to be considered with reference to the question, Whether the land be *intrinsically barren? i. e. suâpte naturâ sterilis* (6), or (as stated in another case), Whether the land is of such a nature as to require an extraordinary and additional expence in the manuring or tilling, or by foldage, &c. to bring it into a proper state of cultivation (7); and *not* Whether it is or is not in its nature so fertile, as after being ploughed and sown to produce of itself without manuring a tillage or crop worth more than the expence of culture and harvesting. (8) Thus where the extraordinary expenditure of lime on land appeared to have been made rather with a view to remove impediments to cultivation, than with reference to any *natural infecundity* of the soil, and

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(4) *Beardmore* v. *Gilbert*.

(5) *Cro. El.* 475. Recognized by *Eyre* C. B. in *Jones* v. *Le David*, 4 *Gwm.* 1337.

(6) *Warwick* v. *Collins*, 5 *M. & S.* 166. 170.; see *Sherington* v. *Fleetwood*, *supra*, *Witt* v. *Buck*, 3 *Bulst.* 166. 1 *Roll. R.* 354. *Stockwell* v. *Terry*, *infra*, 427.

(7) *Selsey* (Lord) v. *Powell*, 6 *Taunt.* 297. *Warwick* v. *Collins*, 2 *M. & S.* 349. *Kingsmill* v. *Billingsley*, 3 *Pri. R.* 465.

(8) *Warwick* v. *Collins*, 2 *M. & S.* 349. For this would introduce uncertainty into the rule, by questions as to ordinary and extraordinary culture. *Id.* 355. *arguend.*

where the general evidence was, that the land was a good natural soil, it was held not to be land of the description intended to be exempted. But where (9), in order to obtain a crop of corn of *any considerable value*, it was necessary to pare, burn, and lime or manure, using more than the ordinary means of culture, the land was held entitled to exemption: but it also appears (1), that from the exposed situation of the above land, no corn would grow without first incurring the cost of stone walls to protect it from the severity of the climate. Exemption was allowed where the ground would not admit of the ordinary process of harrowing. (2) *Semble*, the criterion of barrenness cannot depend on extrinsic circumstances, as the price or difficulty of obtaining manure, lime, &c., but only upon the natural quality of the land. (3) The *onus* of proving land barren lies on defendant. (4)

Shall after the end and term of seven years (5) *next after such improvement fully ended and determined pay tithe*] Note, here are no express words of discharge of the tithes during the seven years; but by reasonable construction it doth impliedly amount to a discharge during the seven years; and the seven years are to be accounted next after the improvement. *2 Inst.* 656. [414]

The trial whether lands are barren or not within the statute, must be in the temporal and not in the spiritual court. And therefore in a suit for tithes in the spiritual court, if the defendant plead that it is barren land, and that plea be refused, or issue taken upon it, there a prohibition shall be granted. But a prohibition shall not be granted upon a suggestion only that it is barren land, before it be pleaded in the spiritual court. *Degge, p.* 2. *c.* 12. 1 *Keb.* 253. (1 *Vez.* 117.) (5)

Forest land.

6. As lands which are in no parish pay tithes to the king, so lands lying within the precincts of a forest (though also in a parish), if they be in the hands of the king, do pay no tithes. And this privilege extends to the king's lessee, but not to his feoffee. But if the forest be disafforested, and be within any parish, then they ought to pay tithes in the hands of the king's lessee. *Boh.* 163, 177. *Gibs.* 680. (6)

(9) *Hutchins* v. *Maughan*, 3 *Gwill.* 1197.
(1) *Ex relat. Eyre* C.B. *Jones* v. *Le David*, 4 *Gwill.* 1338.
(2) *Byron* v. *Lamb*, 4 *Gwill.* 1594. cited by *Eyre* C. B. *id.* 1338.
(3) *Warwick* v. *Collins*, 5 *M. & S.* 166.
(4) *Ibid. Selsey* (Lord) v. *Powell*, 6 *Taunt.* 297.
(5) The suggestion for a prohibition against the spiritual court must be proved within six months after prohibition granted, computed by the calendar, and beginning to run from the *teste* of the prohibition: for it is an affirmative suggestion. *Thomas* v. *Gifford*, 2 *Show. R.* 92. *Straher* v. *Baynes*, 308.
(6) *Seld. c.* 11. § 4. *Comins'* case, *Hetl. R.* 60. *Wats. C. L.* 506. *Hertford* v. *Leach*, Sir *W. Jo. R.* 387.

It hath been questioned, where a park hath paid a modus, and is disparked, whether the modus shall continue, or be discharged, and tithes paid in kind; and all the books are clear, that if the modus was a certain consideration in money for all the tithes of such a park, such modus shall hold, notwithstanding it be disparked; but if the modus was, for the deer and herbage of such a park, the modus is gone, upon disparking. *Gibs.* 684. *Wats. c.* 47. (*d*)

In like manner, if the modus hath been to pay a buck and a doe for all the tithes of such a park, and the park is disparked, the modus shall continue, and the owner may give a buck and a doe out of another park; but if it was, to pay the shoulder of every deer, or expressly a buck or a doe out of the same park, the modus is gone. *Gibs.* 684. *Wats. c.* 47.

But where the modus was, part in money, and part in venison out of the park (namely, two shillings and the shoulder of every deer); the court was divided, two being of opinion that the
[415] two shillings continued, and that the spiritual court should assign an equitable recompence for the shoulders, according to the number that had been usually paid; and the other two, that the money and venison making one entire modus, the one being gone, the whole was dissolved. *Gibs.* 684. *Wats. c.* 47. (*e*)

Glebe land. 7. Glebe lands in the hands of the parson shall not pay tithe to the vicar, though endowed generally of the tithes of all lands within the parish; nor, being in the hands of the vicar, shall they pay tithe to the parson: and this is according to the known maxim of the canon law, that the church shall not pay tithes to the church. (7) But if the vicar be specially endowed of the small tithes of the glebe lands of the parsonage, then he shall have them, though they are in the hands of the appropriator. *Gibs.* 661. *Deg. p.* 2. *c.* 2.

If a parson lease his glebe lands, and do not also grant the tithes thereof, the tenant shall pay the tithes thereof to the parson. *Deg. p.* 2. *c.* 2. 1 *Roll's Abr.* 655.

And if a parson lets his rectory, reserving the glebe lands, he shall pay the tithes thereof to his lessee. *Gibs.* 661.

If a parson sow his glebe, and dieth before severance, and afterwards his successor is inducted, and his executor or vendee severeth the corn; the successor shall have the tithe thereof; for although the executor represent the person of the testator,

(*d*) *Bedingfield* v. *Feake, Moore*, 909. 1 *Roll.* 176.

(*e*) *Cowper* v. *Andrews, Hob.* 39. *Moore*, 863. 1 *Roll. Rep.* 120.

(7) *Blincoe's case, Moore*, 457. 479. 910. *Harris* v. *Cotton*, 1 *Brownl.* 69. *Vicar of Stourton* v. *Greisley, Sav.* 3. *Blincoe* v. *Barksdale, Cro. Eliz.* 479. 578. *Non enim levitæ a levitis decimas accepisse leguntur*, X. 30. 2. But this exemption does not extend to the lessee or feoffee of the vicar. *Brownl.* 69. 17 *Vin. Ab.* 297. *Quære*, see *infra*, IV. 2.

yet he cannot represent him as parson, inasmuch as another is inducted. 1 *Roll's Abr.* 655. [*Wats. Cl. L.* 504.]

Otherwise, if the person dieth after severance from the ground, and before the corn is carried off; in this case, the successor shall have no tithe, because, though it was not set out, yet a right to it was vested in the deceased parson, by the severance from the ground [because the land was no longer producing it]. The same is true in case of deprivation, or *resignation*, (8) after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in: otherwise if severed. *Gibs.* 662. [Emblements.] (8)

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8. All abbots and priors, and other chief monks, originally paid tithes as well as other men, until pope Paschal the second exempted generally all the religious from paying tithes of lands of their own hands. And this continued as a general discharge, till the time of king Henry the second, when pope Hadrian the fourth restrained this exemption to the three religious orders only of Cistertians, Templars, and Hospitalers: unto which pope Innocent the third added a fourth, to wit, the Præmonstratenses. And this made up the four orders, which are commonly called the privileged orders; for that they claimed a privilege to be discharged of tithes by the pope's establishment. (9) Abbey land, [see Monasteries.]

(8) A parson who resigns his living is not entitled to emblements; for his resignation is his own act; but the lessee of glebe of a parson who resigns is entitled to them; for his tenancy is determined by the act of another. *Bulwer* v. *Bulwer*, 2 *Bar. & Ald. Rep.* 471. *semb.* overruling *Moyle* v. *Ewer*, 2 *Bulstr.* 184. 1 *Roll. Ab.* 655. *Gibs. Cod.* 661. *Degge*, ch. 2. p. 2.

(9) *Seld. c.* 13. § 2. Bishop of *Winchester*'s case, 2 *Rep.* 44. The exemptions of the three first were ratified in England by the council of Lateran, which was a general law, having equal authority with an act of parliament, and concluding all parties; (*Stavely* v. *Ullithorn*, *Hardr.* 101.) and therefore continue legal; (*Doubitofte* v. *Curteene*, *Cro. J.* 454. *Wats. C. L.* 532.) but as all the books are silent as to the allowance of this privilege in England to the order of the *Præmonstratenses*, this bull of Innocent the Third will not avail persons who claim an exemption from tithes under a title of having obtained their lands from that order. *Townley* v. *Tomlinson*, *Gwm.* 1004.

The manors, parsonages, tithes, pensions, *privileges*, &c. of the prior and brethren of St. John of Jerusalem, were vested in the king by 32 *H.* 8. *c.* 24.; and it has been accordingly contended that the lands of this priory, not being within the body of the act 31 *H.* 8. *c.* 13., cannot be exempted from tithes by it. *Gwm.* 250. *Urrey* v. *Bowyer*, &c. But this latter statute has been termed *bifrons*, having relation as well to monasteries *dissolved before as after it*, and to all lands which came to the king after 4 *Feb.* 27. *H.* 8. A.D. 1535, 1536. (*Whitton* v. *Weston*, *Latch. R.* 89. *Godb. R.* 392.): and these lands are exempted from tithes under the word 'privileges;' which exemption is not personal in the king, but a real discharge of the land given by the statute, and extends to lessees of the crown, *quamdiu propriis manibus excolunt*. *Fosset* v. *Franklyn*, Sir *T. Raym.* 225.: and see 417, *note* (4).

Then came the general council of Lateran in the year 1215; and further restrained the said exemption from tithes of lands in their own occupation, to those lands which they were in possession of before that council. (1)

But the Cistertians, as it appeareth, in process of time did procure bulls to exempt also their lands which were letten to farm: for the restraining of which practice, the statute of the 2 *H.* 4. *c.* 4. was made; by which it was enacted, that as well they of the said order, as all other religious and seculars, which should put the said bulls in execution, or from thenceforth should purchase other such bulls, or by colour thereof should take advantage in any manner, should incur a præmunire. [And see 7 *H.* 4. *c.* 6.]

So that this statute restrained them from purchasing any such exemptions for the future; and as to the rest, left their privileges as they were before the said statute, that is to say, under a limitation to such lands only as they had before the Lateran council aforesaid; and it is certain they obtained many lands after that council, which therefore were in no wise exempted. (2) And also the said statute left them, as it found them, subject to the payment of divers compositions for tithes of their demesne lands made with particular rectors; who, contesting their privileges even under that head, brought them to compound. Which two restraints were also followed by a third, at the time of the dissolution; when, as many of them as did not fall under the statute of the 31 *H.* 8. *c.* 13. lost their exemptions, there being no saving clause in the acts of their dissolution or surrender to preserve or to revive them. (3)

But as to those which were dissolved by the 31 *H.* 8. *c.* 13. it is enacted as followeth: viz. Where divers abbots, priors, and other ecclesiastical governors of the monasteries, abbathies, [417] priories, nunneries, colleges, hospitals, houses of friers and other religious and ecclesiastical houses and places dissolved by this act, have had divers parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of the payment of tithes for their monasteries or other religious and ecclesiastical houses and places as aforesaid, manors, messuages,

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(1) *Lord* v. *Turk*, *Bunb.* 122.

(2) To entitle lands to this exemption, it is necessary they should have been in the hands of those orders before the council of Lateran, (A.D. 1179.) (*Stavely* v. *Ullithorn*, *Hardr. R.* 101.); and if such lands have ever paid tithes, it will induce a presumption that they were purchased by them after that time. *Lord* v. *Turk* (1722.), *Bunb. R.* 122.

(3) Therefore all the lands belonging to the lesser monasteries dissolved by 27 *H.* 8. *c.* 28. are now liable to pay tithes. *Com. Dig.* tit. *Dismes.* (E 7.)

lands, tenements, and hereditaments; it is enacted, that as well the king our sovereign lord, his heirs and successors, as all other persons, their heirs and assigns, who shall have any of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, or other ecclesiastical houses or places, sites, circuits, precincts of the same or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, which belonged to any such religious house, shall hold and enjoy, as well the said parsonages appropriate, tithes, pensions, and portions of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friers, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner, as the said late abbots, priors, and other ecclesiastical governors held and enjoyed the same. § 21. (4)

By reason of which discharge from tithes of lands, which were given to the king by this act, and which were discharged in the hands of the religious, it hath been more strictly inquired, what were the houses dissolved by this act, than by any other of the acts of dissolution; which will best appear by the following catalogue:

Catalogue of monasteries of the yearly value of 200*l.* or upwards, dissolved by the statute of the 31 *H.* 8; and by that means capable of being discharged of tithes. In which are the following abbreviations:

Ab. Abbey; Pr. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistertians; T. in the time of; ab. about the year.

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(4) This act is *bifrons,* and relates to monasteries dissolved *before* as well as *after* its passing. *Whitton* v. *Weston, Latch. R.* 89. *Godb. T.* 392. All its clauses respecting the possession of monasteries relate to those lands which came to the king after 4 Feb. 27 *H.* 8., A.D. 1535, 1536, and exempt the same from tithes, though the crown may have granted them away before that act was passed. *Gerrard* v. *Wright, Cro. J.* 607. *Tate* v. *Skelton, Gwm.* 1503.

Bill by a lay impropriator for tithes of part of the possessions of the priors of St. John of Jerusalem, which were exempt *quamdiu propriis manibus,* &c.: and then defendant set forth the statute 31 *H.* 8. with the clause of discharge; and also the statute 32 *H.* 8. *c.* 24. whereby these priories, with all privileges, &c. were vested in the crown, and that no tithes in kind had been paid to the crown ever since: Held a good exemption. *Hanson* v. *Fielding* (1736.) *Bunb. R.* 214. *Gilb. R.* 225.

Bedfordshire.

Monasteries.		Order.	Founded.		Value. *l.*	*s.*	*d.*
Newnham Pr.	—	C. Aust.	T. Hen. 1.	—	293	15	11
Elmeston Ab.	—	Ben. —	T. W. Conq.		284	12	11
Wardon Ab.	—	Cist. —	1139.	—	389	16	6
Chicksand Pr.	—	Wh. C. Gilb. —	T. W. Rufus.		212	3	5
Dunstable Ab.	—	C. Aust.	T. H. 1.	—	344	13	3
Wooburn Ab.	—	Cist. —	T. John.	—	391	18	2

Berkshire.

Reading	—	Ben. —	T. Hen. 1.	—	1938	14	3
Busleham Ab.	—	C. Aust.	13 Ed. 3.	—	285	0	0
Abington Ab.	—	Ben. —	720.	—	1876	10	9

Buckinghamshire.

Ashrug Coll.	—	C. Aust.	T. Ed. 1.	—	416	16	4
Notley Ab.	—	C. Aust.	1112.	—	437	6	8
Missenden Ab.	—	Ben. —	1293.	—	261	14	6

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Cambridgeshire.

Thorney Ab.	—	Ben. —	972.	—	411	12	11
Barewel Pr.	—	C. Aust.	1092.	—	256	11	10

Cheshire.

St. Werburge Ab.	—	Ben. —	1095.	—	1003	5	11
Combermeer Ab.	—	Cist. —	1134.	—	225	9	7

Cornwall.

Bodmin Pr.	—	C. Aust.	936.	—	270	0	11
Launceston Ab.	—	C. Aust.	T. W. Conq.		354	0	11
St. Germans Ab.	—	C. Aust.	T. Ethelston		243	8	0

Cumberland.

Carlisle Pr.	—	C. Aust.	T. W. Rufus.		418	3	4
Holme Coltrom Ab.	—	Cist. —	1135.	—	427	19	3

Derbyshire.

Darley Ab.	—	C. Aust.	T. Hen. 2.		238	14	6

Devonshire.

Ford Ab.	—	Cist. —	1133.	—	374	10	6
Newnham Ab.	—	Cist. —	ab. 1246.	—	227	7	8
Dinkeswel Ab.	—	Cist. —	1201.	—	294	18	6

Monasteries.		Order. Founded.		Value. l.	s.	d.
		Devonshire.				
Hertland Ab.	—	C. Aust. T. Hen. 2		306	3	2
Torre Ab.	—	Præm. T. Ric. 1.	—	396	0	11
Buckfast Ab.	—	Cist. — T. Hen. 2.		460	11	2
Plimpton Ab.	—	Cist. — T. Edw. 1.		241	17	9
Tavestock Ab.	—	Ben. — 961	—	902	5	7
Exon Pr.	—	Clun. — T. Hen. 1.		502	12	9
		Dorsetshire.				
Abbotsbury	—	Ben. — ab. 1016.	—	390	19	2
Middleton Ab.	—	Ben. — T. Ethelstan.		538	13	11
Tarrent Ab.	—	Cist. — By Hen. 3.		214	7	9
Shafton Ab.	—	Ben. — 941.	—	1166	8	9
Cerne Ab.	—	Ben. — T. Edgar.	—	515	17	10
Sherburn Ab.	—	Ben. — ab. 370.	—	682	14	7
		Durham.				
St. Cuthbert Ab.	—	Ben. — ab. 842.	—	1366	10	9
Tinmouth Pr.	—	Ben. — ———	—	397	11	5
		Essex.				[419]
Berking Ab.	—	Ben. — 680.	—	862	12	5
Stratford Langthorne Ab.		Cist. — 1135.	—	511	16	3
Waltham Ab.	—	C. Aust. ab. 1060.	—	900	4	3
Walden Ab.	—	Ben. — 1136.	—	372	18	1
St. Oswith Ab.	—	C. Aust. 1120.	—	677	1	2
Colchester Ab.	—	C. Aust. T. Hen. 1.		523	17	0
		Gloucestershire.				
Bristol Ab.	—	C. Aust. T. Hen. 1.		670	13	11
Hayles Ab.	—	Cist. — 1246.	—	357	7	8
Winchcomb Ab.	—	Ben. — 787.	—	759	11	9
Tewkesbury Ab.	—	Ben. — 715.	—	1598	1	5
Cirencester Ab.	—	C. Aust. T. Hen. 1.		1051	7	1
Kingswood Ab.	—	Cist. — 1139.	—	244	11	2
Gloucester Ab.	—	Ben. — 680.	—	1946	5	9
Lanthony Pr.	—	C. Aust. 1136.	—	641	19	11
		Hampshire.				
St. Swithin's Winton Ab.		Ben. — 634.	—	1507	17	2
Hyde Ab.	—	Ben. — By Alfred.	—	865	18	0
Wherwell Ab.	—	Ben. — By Edgar.	—	393	8	7
Romsey Mon.	—	Ben. — 907.	—	303	10	10
Twinham Pr.	—	C. Aust. Before 1042.		312	7	0
Belleloco Ab.	—	Cist. — 1024.	—	326	13	2

Monasteries.		Order. Founded.		Value. l.	s.	d.
		Hampshire.				
Southwick Pr.	—	C. Aust. T. Hen. 1.		257	4	4
Tichfield Ab.	—	Præm. T. Hen. 3.	—	249	16	1
		Hertfordshire.				
St. Albans Ab.	—	Ben. — 755.	—	2102	7	1
		Huntingdonshire.				
St. Neots Ab.	—	Ben. — ab. T. Hen. 1.		241	11	4
Ramsey Ab.	—	Ben. — 969.	—	1716	12	4
		Kent.				
St. Austins Cant.	—	Ben. — 605.	—	1413	4	11
Ledis Pr.	—	C. Aust. 1119.	—	362	7	7
Feversham Ab.	—	Clun. 1147.	—	286	12	6
Boxley Ab.	—	Cist. — 1144.	—	204	4	11
Roffen Ab.	—	Ben. — 600.	—	486	11	5
Malling Ab.	—	Ben. — By Edmund.		218	4	2
Dertfort Ab.	—	C. Aust. 1372.	—	380	0	0
[420]		**Lancashire.**				
Whalley Ab.	—	Cist. — 1172.	—	321	9	1
		Leicestershire.				
Leicester Ab.	—	C. Aust. 1143.	—	951	14	5
Croxdon Ab.	—	Præm. ab. R. 1.	—	385	0	10
Launda Ab.	—	C. Aust. T. W. Rufus.		399	3	3
		Lincolnshire.				
Lincoln St. Cath. Pr.		Gilb. — T. Hen. 2.		202	5	0
Kirksteed Ab.	—	Cist. — 1129.	—	286	2	7
Revesley Ab.	—	Cist. — 1142.	—	217	2	4
Thornton Ab.	—	C. Aust. 1139.	—	594	17	10
Barney Ab.	—	Ben. — 712.	—	366	6	1
Croyland Ab.	—	Ben. — 716.	—	1803	15	10
Spalding Ab.	—	Ben. — 1052.	—	761	8	11
Sempringham Ab.	—	Gilb. — 1148.	—	317	4	1
Epworth Mon.	—	Carth. 1386	—	237	15	2
		London and Middlesex.				
St. John Jerusalem Pr.		——— 1100.	—	2385	12	8
St. Barth. Smithfield		C. Aust. 1102.	—	653	15	6
St. Mary Bishopsg. Pr.		——— 1187.	—	478	6	6
Clerkenwell Pr.	—	Ben. — T. Stephen		262	19	0
London Minors.	—	Ben. — T. Ed. 1.	—	318	8	5

London and Middlesex.

Monasteries.	Order.	Founded.	Value. l.	s.	d.
Westminster Ab. —	Ben. —	T. Edgar. —	3471	0	2
Sion Ab. —	C. Aust.	By Hen. 5.	1731	8	4
London, a house of	Carth.	T. Ed. 3. —	642	0	4
St. Clare witht. Aldg. Mon.	———	1292. —	418	8	5
St. Mary charter house	Carth.	1379. —	736	2	7
St. John Holiwell —	Bl. M.	1318. —	347	1	3
St. Mary East Smithf. Ab.	Cist. —	1360. —	602	11	10

Norfolk.

Thetford Ab.	Clun.	1103.	312	14	4
Wymondham Ab.	Ben. —	1139.	211	16	6
Hulmo Ab.	Ben. —	By Canute.	583	17	0
Westerham Ab.	Præm.	T. Hen. 2. —	228	0	0
Walsingham Ab.	C. Aust.	ab. T. Stephen.	391	11	6
Castle-acre Ab.	Clun.	1090. —	306	11	4
West-acre Ab.	Clun.	T. W. Rufus.	260	13	7

Northamptonshire. [421]

Burg. St. Peter Ab.	Ben. —	By Rosere king of Mercia. —	1721	14	0
Pipewell Ab. —	Cist. —	1143. —	286	11	8
St. Andrews Pr. —	Clun.	1067. —	263	7	1
Sulby Ab. —	Præm.	T. Stephen. —	258	8	5

Northumberland.

Tinmouth, a cell to St. Alban's, a nunnery.			511	4	1

Nottinghamshire.

Lenton Pr.	Clun.	T. Hen. 1.	329	5	10
Thurgarton Pr.	C. Aust.	T. Hen. 1.	259	9	4
Welbeck Ab.	C. Aust.	T. Stephen.	249	6	3
Warsop Pr.	C. Aust.	———	239	10	5
Bella Valla Pr.	Carth.	ab. 16 Ed. 3.	227	8	0
Newsteed Pr. —	C. Aust.	T. Ed. 3. —	219	18	8

The two last are under value in Dugdale, but thus by Speed.

Oxfordshire.

Godstow Ab.	Ben. —	T. Stephen.	274	5	10
Eynesham Ab.	Ben. —	By Ethelred.	441	12	2
Osney Ab.	C. Aust.	T. Hen. 1.	654	10	2
Thame Ab.	Cist —	T. Hen. 1.	256	13	11
Oxford Pr.		Bef. Conq.	224	4	8
Dorchester Ab.	C. Aust.	635. -	219	12	0

Shropshire.

Monasteries.		Order.	Founded.		Value. l.	s.	d.
Haghmond Ab.	—	C. Aust.	1100.	—	259	13	7
Lilleshull Ab.	—	C. Aust.	By Elfleda, king of Mercia.		229	3	1
Wigmore Ab.	—	C. Aust.	1172.	—	267	2	10
Wenlock Pr.	—	Clun.	1181, or before.		401	0	7
Salop Ab.	—	C. Aust.	1081.	—	615	4	3
Hales Owen Ab.	—	Præm.	T. John.	—	337	15	6

Somersetshire.

Glassenbury Ab.	—	Ben. —	About 300.		3311	7	4
Brewton Ab.	—	C. Aust.	ab. T. Conq.		439	6	8
Henton Pr.	—	Carth.	T. Hen. 3.		248	19	2
Witham Pr.	—	Carth.	By Hen. 2.		215	15	0
Taunton Pr.	—	C. Aust.	T. Hen. 1.		286	8	10
Bath Ab.	—	Ben. —	T. Hen. 3.		617	2	3
[422] Keynsham Ab.	—	C. Aust.	T. Hen. 1.		419	14	3
Michelney Ab.	—	Ben. —	740.	—	447	4	11
Buckland Pr.	—	Cist. —	T. Ed. 1.	—	223	7	4

Staffordshire.

Dela Cres Ab.	—	Cist. —	1153.	—	227	5	0
Burton-upon-Trent.		Ben. —	T. Eadred.	—	267	14	3
Croxden Ab.	—	Cist. —	————	—	——	——	——

Suffolk.

St. Edmundsbury Ab.		Ben.	1020.	—	1659	13	11
Butley Ab.	—	C. Aust.	1171.	—	318	17	2
Sibeton Ab.	—	Cist. —	1150.	—	250	15	7
Ixworth Pr.	—	C. Aust.	T. W. Conq.		280	9	5

Surrey.

Merton Pr.	—	C. Aust.	1414.	—	957	19	5
Shene Pr.	—	Carth.	1414.	—	777	12	0
Chertsey Ab.	—	Ben. —	666.	—	659	15	8
Newark Pr.	—	————	———	—	258	11	11
St. Mary Overs Ab.		C. Aust.	1106.	—	625	6	6
Bermundsey Ab.	—	C. Aust.	1106.	—	474	14	4

Sussex.

Lewes Ab.	—	Clun.	T. W. Rufus.		920	4	6
Roberts bridge Ab.		Cist. —	T. H. 2.	—	248	10	6
Battaile Ab.	—	Bl. M.	1066.	—	987	0	11

Warwickshire.

Monasteries.		Order.	Founded.		Value. l.	s.	d.
Combe Ab.	—	Cist. —	T. Steph.	—	311	15	1
Kennelworth Ab.	—	C. Aust.	T. Hen. 1.		538	19	0
Meryval Ab.	—	Cist.	1148.	—	254	1	8
Nuneaton Mon.	—	Ben. —	T. Hen. 2.		253	14	5

Wiltshire.

Malmsbury Ab.	—	Ben. —	ab. 670.	—	803	17	7
Bradenstock Pr.	—	C. Aust.	T. W. Conq.		212	19	3
Edington Pr.	—	C. Aust.	1352.	—	442	19	7
Ambresbury Ab.	—	Ben. —	1177.	—	494	15	2
Wilton Ab.	—	Ben. —	T. Ethelwolf		601	1	1
Fairley, a cell to Lewes.		Clun.	1125.	—	217	0	4
Laycock Ab.	—	C. Aust.	1232.	—	203	12	3

Worcestershire.

Malverne Ab.	—	Ben. —	1053.	—	308	1	3
Evesham Ab.	—	Ben. —	T. Offa.	—	1183	12	9
Pershore Ab.	—	Cist. —	————	—	643	4	5
Hales Owen Ab.	—	Præm.	T. John.	—	282	13	4
Bordesly Ab.	—	Cist. —	1138.	—	388	1	1

Yorkshire.

St. Mary's York, Ab.		Ben. —	1088.	—	1550	7	0
Selby Ab.	—	Ben. —	T. W. Conq.		720	12	10
Kirkstal Ab.	—	Cist. —	1147.	—	329	2	11
De Rupe Ab.	—	Cist. —	1147.	—	224	2	5
Monks Burton Ab.		Clun.	ab. 1186.	—	239	3	6
Nostel Ab.	—	C. Aust.	T. Hen. 1.		492	18	2
Pomfrait Ab.	—	Clun.	T. W. Conq.		237	14	8
Gisbourn Ab.	—	C. Aust.	T. Steph.	—	628	3	4
Whitby Ab.	—	Ben. —	T. W. Conq.		437	2	9
Montegratiæ Ab.	—	Carth.	ab. 1396.	—	323	2	10
Newburge Pr.	—	C. Aust.	1145.	—	367	8	3
Belland Ab.	—	Cist. —	1134.	—	238	9	4
Kirkham Ab.	—	C. Aust.	T. Hen. 1.		269	5	9
Melsa Ab.	—	Cist. —	1136.	—	299	6	4
Brilington.	—	C. Aust.	T. Hen. 1.		547	6	11
Walton Ab.	—	Gilb.	T. Stephen.		360	16	10
Bolton in Craven Pr.		C. Aust.	T. Hen. 1.		212	3	4
Raval Ab.	—	Cist. —	1132.	—	278	10	2
Jerval Ab.	—	Cist. —	T. Stephen.		234	18	5
Furnes Ab.	—	Cist. —	1127.	—	805	16	5
De Fontibus.	—	Cist. —	1132.	—	998	6	8

Monasteries.	Order.	Founded.	Value. l.	s.	d.
Warter Pr. —	C. Aust.	T. Hen. 1. —	221	3	10
Richal. —	————	—	351	14	6
Old Maulton Ab. —	————	T. Stephen.	257	7	0
St. Michael near Hull.	Carth. 1377.	—	231	17	3

In Wales.

Valle de Sancta Cruce in Denbeighshire.	Cist. —	T. Edw. 1.	214	3	5
Strata Florida in Cardiganshire.	Cist. or Clun.	T. W. Conq.	1226	6	0

[424] At the time of the dissolution, the religious were discharged from payment of tithes three several ways; either 1. *by the pope's bulls;* or, 2. *by their order* [viz. *of knights' templars, &c.*] as aforesaid; or, 3. *by composition:* which discharges would have vanished and expired with the spiritual bodies whereunto they were annexed, if they had not been continued by the special clause above mentioned (as it happened to those which were dissolved by the other statutes of dissolution, for want of such clause). And by the said clause also is created a new discharge, which was not before at the common law (5), that is,

Unity of the possession of the parsonage and land titheable in the same hand: for if the monastery, *at the time of the dissolution,* was seised of the lands and rectory, and had paid no tithes within the memory of man for the lands; those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession; because the same persons that had the lands, having also the parsonage, they could not pay tithes to themselves. *God.* 383. *Bob.* 241. 248. (6)

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(5) *Archbishop of Canterbury's* case, 2 *Rep.* 46. *Slade* v. *Drake, Hob. R.* 297.

(6) *Button* v. *Long, Cro. El.* 584. So if the lands were in lease for years, at the time of the dissolution, and the lessee paid tithes, the presumption arising from perpetual unity of possession is not destroyed: for *quoad* the *abbot,* the inheritance was discharged of tithes, and the king or his grantee holds it discharged as the abbot held it for the inheritance: and such lands are therefore tithe free. *Porter* v. *Bathurst, Cro. J.* 559. *Cowley* v. *Keys, Gwm.* 1308.

Blackstone says, that spiritual persons or corporations were *always* capable of having their lands totally discharged of tithes by the above methods, among which he enumerates *unity of possession,* without ascribing its origin to the above clause. Discharge by bull, composition, or order, must have been pleaded specially at common law: whereas *another* discharge from tithe of lands of spiritual persons or corporations, *viz.* by

Prescription, or having *never been liable to tithes by being always*

But though by such union the persons so possessed were discharged from the payment of tithes, yet the lands were not absolutely discharged of the tithes: for upon any disunion that might happen, the payment of tithes again revived (7), so that the union only suspended the payment, but was no absolute discharge of the tithes themselves. (8) And therefore such union is not to be pleaded as a discharge from tithes, but only as a discharge from the payment of tithes. *Boh.* 248. (9)

And such union must appear to have had these four qualities: First, it must have been *just*; that is, claimed by right, and good and lawful title: and not by disseisin or other tortious, unjust, or unlawful act: for such an union would not have been a good discharge within the statute. Secondly, it must have been *equal*; that is, there must have been a fee-simple both in the lands and in the tithes; as well of the lands upon which the tithes are, as of the parsonage or rectory: for if those religious persons had held but by lease, that had not been such a unity as the statute intended. Thirdly, it must have been *free*; that is, free from the payment of any tithes in any manner: for if the abbots, or their farmers, or their tenants at will or for years, had paid any manner of tithes before the dissolution; it may be alleged as a sufficient bar to avoid the unity pleaded in discharge of tithes. Fourthly, it must have been *perpetual*, time out of mind, that such religious houses were endowed, and such religious persons [425] must have had in their hands both the rectory and lands united, perpetually, and without interruption, before the memory of man, or (as it seems according to the rule of the common law) before the first year of king Richard the first, discharged of tithes: for if by any records, or ancient deeds, or other legal evidence, it can be made to appear, that either the lands or the rectory came to the abbey since the said first year of king Richard the first, such union cannot be said to be perpetual. *Boh.* 250.

And morever, the lands of such houses dissolved as aforesaid, shall be free from the payment of tithes only so far, as they were free in the hands of the churchmen, namely, whilst they are in

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in spiritual hands, was allowed without any other reason, when it did not appear that tithes had ever been paid, because they were persons capable of such discharge. *Slade* v. *Drake*, *Hob. R.* 297. And evidence that the land of a spiritual farmer has never paid tithes is sufficient to prove the prescription. *Nash* v. *Molins*, *Cro. El.* 206. *Clavill* v. *Oram*, *Gwm.* 1355. This usage must have been constant, without interruption, perpetual, and immemorial, *viz.* from the time of Rich. I.'s return from the holy wars.

(7) *Benton* v. *Trott*, *Moor.* 528.

(8) Unity of possession did not *extinguish* tithes. See 30 *H.* 8. *Dyer*, 43. 32 *H.* 8. *Br. Dismes*, 17.

(9) *Henkin* v. *Gay*, *Bunb.* 37.

the hands and manurance of the owners thereof; and therefore it is necessary for the party who would have the advantage of this privilege, expressly to shew and aver, that the lands are in his hands and manurance: for to say that he is seised of the lands is not sufficient; for he may be seised thereof, and yet another manure them. *Fox* v. *Bardwell*, *Comyns*, 498. *E.* 8 *G.* 2. *Wood. b.* 2. *c.* 2. [2 *Inst.* 651.]

It hath been held also, that a tenant in tail, who hath an estate of inheritance, shall be discharged in virtue of the clause aforesaid, so long as he occupies the same himself; but that unity of possession doth not discharge a copyholder (though a prior in that case was seised in fee of the manor of which it was parcel, and was also impropriator); much less a tenant for life or years. *Gibs.* 673. (1) [For in such case, the possession is in the copyholder or other tenant, and not in the landlord or lessor; and consequently it is not a unity of possession.]

But it is otherwise with regard to the king; whose farmers shall be discharged of such tithes, as the spiritual persons were, because the king cannot cultivate the lands himself. (2) And so long as the king hath the freehold, his farmers shall have such privilege: but if after having leased them, he shall sell the same, or shall grant over the reversion; then the farmers shall pay tithes. And it hath been said, that this privilege extends no
[426] further than to the king's tenants at will; not to tenants for life or years. *Gibs.* 673. *Boh.* 282, 283. [*Com. Dig.* tit. *Dismes* (E 7.), *infra*, 9.] (3)

Upon the whole: Not all lands that belonged to the religious

(1) *Wilson* v. *Redman*, *Hardres*, 174. *Moore*, 219. 534. *Lagden* v. *Flack* (433. *n.* 9.). But *quære;* for in the case of *Hett* v. *Meeds*, it was held, that the lands of *a tenant for life under a settlement* were exempt from tithes. 4 *Gwill.* 1515.; and see 433. *note* (6). Where, however, an abbot having a privilege to be discharged from tithes *quamdiu manibus propriis excoluit*, in the time of Edw. IV. made a gift in tail, it was held that the donee of the issue should not be discharged, for the statute discharges none but *as* the abbot was discharged at the time of the dissolution (31 *H.* 8.), so that they must claim the estate and discharge under the abbot since the statute; and so it holds if by common recovery the reversion had been barred before or after the statute: but if the land had returned to the abbot or the king before or after the statute, the case is otherwise. *Farmer* v. *Shereman*, *Hob. R.* 248.

(2) *Com. Dig.* tit. *Dismes* (E 7.). 2 *Wood. V. L.* 100. *Bluncoe* v. *Marston*, *Cro. El.* 479. *Wright* v. *Wright*, *id.* 511. *Sav.* 3. *Moor.* 910. *Compost's* case, *Hardr.* 315.

(3) *Degge*, *c.* 21. 334. *Ingolsby* v. *Ullethorn*, *Hardr.* 381. *Anon. Owen.* 46. *Linnox* or *Lennox*, countess's, case, 2 *Leon.* 71. *Anon*, *Moor. R.* 915. And if after having leased lands he sells them or grants over the reversion, they are liable to pay tithes. *Gibs.* 673.

houses in general are discharged from tithes; but only such lands are capable of discharge, as belonged to the houses which were dissolved by the statute of the 31 *H.* 8. And not all those lands which belonged to the religious houses dissolved by that statute are discharged from tithes; but only such of them as were discharged at the time of their dissolution. But what shall be sufficient evidence of such discharge, and of the manner of such discharge, that is, whether by order, bull, composition, or unity of possession, at this distance of time, seemeth difficult to determine with precision; as strictness of proof may be more or less requisite, according to the particular circumstances of the case.

Tate v. *Shelton.* This was a bill by the rector of Coningsby in the county of Lincoln for the great and small tithes of the parish. It was proved that the lands, whereof the tithes were demanded, belonged to the abbey of Kirksted, which was a Cistertian abbey: it was also proved, that the monastery with its possessions had come to the hands of the king in 28 *H.* 8., by the attainder of Richard Harrison the abbot, and that these lands were granted in 30 *H.* 8. by the crown to the duke of Suffolk in fee. It was contended, on the part of the plaintiff, that as the lands were not in the *possession of the crown*, when the statute of 31 *H.* 8. *c.* 13. was passed, they were not within the protection of the 21st section of that statute. But the court were of opinion that the statute of 31 *H.* 8. was sufficiently broad to comprehend all monasteries which were dissolved after the 4th of February, 27 *H.* 8.; and that the lands of any such monasteries were exempt from the payment of tithes under that statute, though the crown may have granted them away before the statute was passed 4 *Gwill.* 1503.

In the case of the *Archbishop of York and Dr. Hayter* against *Sir Miles Stapleton and others*, Feb. 21. 1740; it was said by lord *Hardwicke*, that the evidence of exemption depends upon usage; and a posterior usage is evidence of the preceding, for no other can be had. 2 *Atkyns*, 137. (*g*)

(*g*) In *Lamprey* v. *Rooke*, 11 Dec. 1755. *Amb.* 291. Lord *Hardwicke* declared his opinion, that if lands appear to have been part of the possession of any of the great monasteries (which were dissolved by stat. 31 *H.* 8.), and there is no evidence of the payment of tithes for those lands at any time, courts will consider them as discharged, by some way or other, before the dissolution in the hands of the abbot, &c.; and that it is sufficient to allege, that they were part of the possessions, &c. and were, at the time of the dissolution, by prescription, composition, or by other lawful ways and means, discharged from payment of tithes. See also 2 *Rep.* 48. *b.* and [*Nash* v. *Molins*,] *Cro. Eliz.* 206. In *Pratt* v. *Hopkins*, 3 *Bro. P. C.* 521. the house of lords affirmed the decree of the court of exchequer, that lands ex-

The king for ancient demesne [and other lands: see ante, 425.]

9. *M.* 14 *C.*2. *Compost*'s case. It was held, that the king is not by virtue of his prerogative discharged of tithes for ancient demesnes of the crown, but that as *persona mixta* he is capable of a discharge *de non decimando* by prescription, as well as a bishop. (4) But if the king *alien* any of the lands for which he is so

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discharged of tithes, his feoffee or patentee shall pay tithes (5); and not only so, but the prescription is destroyed for ever, although the same lands should afterwards come into the king's hands again, by escheat, or otherwise. *Hardr.* 315. (6)

Common appurtenant.

10. In *Lambert* v. *Cumming*, *M.* 1723; On a bill for tithes in the parish of Warton in the county of Lancaster, it was decreed, that an exemption of an estate from tithes shall extend to a common appurtenant to such an estate. *Bunb.* 138.

July 15. 1748, *Stockwell* v. *Terry*. A bill was brought by the rector for payment of tithes in kind of 300 acres of land. Two bars were set up; *the first*, general, to all the acres, the statute of 2 Ed. 6. by which waste ground, improved into arable or meadow, shall not pay tithes, till seven years after the improvement is completed; as to which, the case appeared that the land in question was a common field for sheep, horses, and cows, but not fit for fattening them, being overrun with brushwood, briars, and other weeds; the parson was entitled to tithes of calves, milk, wool, and the like, out of it; and it was proved to be worth 2*s.* an acre before it was improved: and as to this, the court was of opinion, that it is not such land as ought to be exempted by the statute in the name of barren land. *The other bar* set up was particular to 48 acres, parcel thereof: as to which, an agreement had been entered into between the defendant and the par-

empted from tithes, as being part of the demesnes of an ancient monastery, being inclosed by act of parliament, shall not be made liable to tithes by general words in the act, saving the right of the rector, impropriator, &c.

(4) *Hertford* v. *Leech*, Sir *W. Jon. R.* 387. *Compost*'s case, *Hardr.* 315. *supra*.

(5) *Comin*'s case, *Hetl. R.* 60. *Hotham* v. *Foster*, *Gwm.* 869. *Hertford* v. *Leech*, Sir *W. Jon. R.* 387. *Bannister* v. *Wright*, *Styl. R.* 137.

(6) See cases in last note, and *Morant* v. *Cumming*, *Cro. Car.* 94.; but see *Wickham* v. *Cooper*, *Cro. El.* 216. But the king's patentees of the lands of the larger abbeys, &c. which came to the crown by stat. 31 *H.* 8. may take advantage of a prescription *de non decimando* in the abbot, &c. by force of that statute; and the enjoyment of the lands since the dissolution free from tithes during memory is good proof, *à posteriori*, that the abbot, &c. held them discharged. *Degge*, *c.* 16. 306. *Com. Dig.* tit. *Dismes* (E 7.). And such abbey lands in the hands of the grantees of the crown are discharged, though at the time the abbey was dissolved they were in lease for years, and the lessee paid tithes. *Porter* v. *Bathurst*, *Cro. J.* 559. *Cowley* v. *Keys*, *Gwm.* 1308. But the prescription must be proved by the lessee or grantee of the crown.

son, and those who had right to feed in the common, for the making an inclosure: and an act of parliament was passed for that purpose, by which they enjoy all their rights in severalty, as they did their rights of common before. These 48 acres were allotted to the defendant, in lieu of his common; and the question was, Whether this was still covered by a modus, which had been paid for it before?——For the plaintiff it was argued, that these 48 acres are of another nature, and not to be covered by it. If there is a modus for any thing, and a new part is joined to it, that addition must be paid for; as if a modus for two mills, and a third is added, the modus will not cover it; so if for a garden, and an addition is made to it; if a buck, and a doe are paid for a park, and it be disparked, tithes must be paid for it.— For the defendant it was argued, that the general view of the agreement and of the act of parliament was, that none should be prejudiced; and that it should be exactly in the same situation [428] as before, except that it should not be in common. But the construction contended for, will give the parson, whose former right was preserved, what he had not before. —— By the lord chancellor Hardwicke; I am of opinion that the 48 acres are covered by the modus. I admit the case mentioned, and that by disparking the modus is gone; and if the owner disparks part, he shall pay the same modus, and also tithes in kind, for what is disparked, because it was paid in nature of a franchise, and not for lands. But suppose the owner, with consent of the parson, disparks some to be enjoyed as before; I should think, it was the incumbent's intent, that it should be still enjoyed as part of the park, and no tithes in kind should be paid for it, for otherwise the agreement with the parson would be useless. So if this agreement had been between the lord of a manor and the other commoners without the parson, and they had turned it into several ownerships, it would be liable to the right to tithes, which the rector had over the whole parish. But here has been an agreement by act of parliament, to which the parson was party; and although the recital uses only general words, yet it shews plainly the intention of the parties to be, that every person should enjoy his allotment in the same manner as he did the thing in lieu; and that was subject to the modus. Let the bill therefore be dismissed as to the 48 acres; and as to the rest, an account be taken of the several tithes to be paid. 1 *Vesey*, 115.

E. 3 *G.* 3. *Moncaster* v. *Watson*. This was a case reserved from the northern circuit, in an action by a lay impropriator, against the occupiers of lands in the parish of Felton in the county of Northumberland, for taking away their corn and hay, without setting out the tithe, or agreeing for it. The substance of the stated case was, that they claimed to be exempt from paying any tithe at all for these lands, upon the following foundation,

viz. that a private act of parliament was passed in the 26 *G.* 2. for dividing and inclosing the common called Felton common: That the lands in question had been, till the said year, (when the said common was so divided and inclosed) part of the said common, whereupon the commoners had used to have common for their cattle levant and couchant: That 90 acres, part of the said common, were by the said act of parliament allotted to the owner of Swardland demesne; under which said allotment, the defendants occupy the said 90 acres, formerly parcel of the common,
[429] but now made parcel of Swardland demesne: That the act directs that the divided lands (before parcel of the common) shall be holden by each person to whom the respective divisions are allotted, subject to the same charges and incumbrances, as their own former lands, to which they are allotted and consolidated, were before subject; and it is declared in the act itself, that it shall be considered beneficially to the said land-owners to whom the respective divisions are allotted: That the owners of Swardland demesne had never paid tithe of corn, grain, or hay; having been always exempt from the payment of tithe of corn and grain, in consideration of having always kept in repair the north end of Felton church; and being exempt from the payment of tithe of hay, under a modus. The question was, whether the occupiers of these 90 acres, late parcel of the common, but now allotted to the owner of Swardland demesne, are or are not liable to the payment of tithe of corn or hay.—Mr. Wallace, who argued for the defendants, contended, that as the allotment was to bear all the burdens of the ancient estate to which it was now annexed, it ought therefore to enjoy all the privileges of it: And as this ancient estate was exempt from tithes, so also ought the allotted 90 acres to be. And he relied on the case of *Stockwell* and *Terry*, which he said was as follows: Stockwell, rector of the parish, filed his bill against the occupier of some land (then ploughed up) for tithe of the corn which grew upon it. The defendant insisted upon a modus of 15*s.* in lieu of all tithes arising upon the Grange farm; and that the Grange farm had never paid any tithes. Then he shewed, that the land for which Stockwell demanded this tithe of corn by his bill, had been part of a down which had been inclosed by a private act of parliament, and had been thereby allotted to and had ever since continued part of the Grange farm; and therefore ought to be exempt from all tithes, as well as the Grange farm itself. And lord *Hardwicke* dismissed the rector's bill, so far as it related to this land which had been down-land, and was so allotted to the Grange farm.—Mr. *Thurlow*, for the plaintiff, argued, that notwithstanding this decree in *Stockwell* and *Terry*, yet in the present case (which differs much from that) the allotted common is not exempted from the payment of tithes. This demand of the im-

propriator is a claim of the tithe of corn, grain, and hay. But corn, grain, and hay, could not be part of what grew on a com- [430]
mon. The tithes that arose upon this common (appendant to Swardland demesne) could have been only tithes of agistment, or of lambs, calves, wool, milk, and other things that could be the produce of a common. Now, a modus or other compensation must be in lieu of these specific tithes. This exemption therefore cannot relate to any other tithes, but such as could in their nature have arisen out of the common, whilst it continued common. — By lord *Mansfield* chief justice: The case of *Stockwell* and *Terry* differed very much from the present case. The modus insisisted upon in that case extended to all kinds of tithes; whereas the exemption insisted on in the present case is confined to the specific land called Swardland demesne, and doth not extend to the right of common. Here is no equivalent at all for the tithes of agistment, of wool, milk, lambs, or any other tithes of such a kind as could arise upon a common. The equivalent goes only to corn, grain, and hay; the tithe whereof could not arise upon the common, whilst it remained a common. In *Stockwell* and *Terry*, the rector was, as owner of the glebe, a party to the act of parliament: Here, the impropriator is not a party to this act of parliament. (7) And there the modus covered the right of common; it was a modus of 15*s*. which was paid for the Grange farm, in lieu of all tithes arising upon it, and of all the tithes of all the cows and sheep belonging to that farm that should be depastured on the said Down, which was afterwards inclosed and allotted to it. So that the modus covered not only the Grange farm itself with its appurtenances, but the common also: which is not the present case. In that case, lord *Hardwicke* decreed, that the modus should stand for the allotted lands, as well as for the Grange farm and its appurtenances; and accordingly, he dismissed the bill as to those lands, which the modus covered: But as to all the other lands of the common, which had before used to pay tithe of wood, agistment, and other small tithes, he decreed an account. Here, all rights are saved, generally, by this act of 26 *G.* 2. Consequently, the impropriator's right to tithes remains: And there is no need to show how they are due; because they are due of common right. — The whole court were very clear, that in the present case the exemption and modus did not extend to the waste and common; and there- [431]
fore that the allotted lands, which had been part of that waste and common, having been subject to tithes before the allotment, must remain liable to them after it: which they held to differ materially from the cited case, where the modus did extend to

(7) And a claim of tithe can only be discharged by special words. *Parkins* v. *Hinde*, *Cro. El.* 161.

the waste and common. And lord *Mansfield* said, that the case of *Lambert* and *Cumming* was determined upon the same ground as lord *Hardwicke*'s decree went upon in the case of *Stockwell* and *Terry*; namely, "That what was before exempted shall "remain exempted; and what was not before exempted shall "pay tithe." 3 *Burr*. 1375. [1 *Bla. R.* 402. S. C.]

E. 38 *Geo.* 3. *Lord Gwydir* v. *Foakes*. In the parish of Croydon, in the county of Surry, there was a large quantity of waste land, on which the tenants of the adjoining estates had rights of common. Before any inclosure was in contemplation, the tenants purchased the right to all the tithes of the lay impropriator in respect of their several estates. The conveyances were made in very general terms: "*All tithes arising out of or in respect of the several messuages or tenements, farms, lands,*" &c. The court of K. B. held that the tithes in respect of the rights of common appurtenant to such farms or lands passed by such grant, and the subsequent inclosure of the common could not vary the question, notwithstanding the increased value of such tithes. 7 *Term. Rep.* 641.

[Commons inclosed by act of parliament.]

[A. having purchased an estate and the tithes thereof, with a right of common thereto annexed; the common was afterwards inclosed under an act of parliament, and certain land was allotted to A. in lieu of his said right of common. No tithe is payable in respect of the allotted land (8), for the land in respect of which it is allotted is *wholly* free from tithe.

By the East Moulsey inclosure act it was enacted, "That the "commissioners should set out, allot, and award certain portions "of lands out of the commons to be inclosed unto the impro- "priate rectors and curate in lieu of all great and vicarial tithes:" and the commissioners were required to distinguish by their award the several allotments to the rectors and curate respectively, and the *same* allotments were declared to be in full satisfaction and discharge of all tithes: Held under this act, that the tithes were not extinguished till the commissioners had awarded as well as allotted and set out the allotments; for the freehold did not vest therein before the award was executed. (9) As to ripping up an allotment to a benefice after 50 years elapsed for insufficiency, see *Cooper* v. *Thorpe*. (1)

An inclosure act appointed a corn rent to be paid in lieu of tithes to be ascertained by certain referees, and the exact amount declared by an order of quarter sessions. It appeared that the sessions merely received and filed the report of the referees; and

(8) *Steele* v. *Manns*, 5 *Bar.* & *Ald.* 22.

(9) *Ellis* v. *Arnison*, 5 *B.* & *A. Rep.* 47. See *Farrer* v. *Billing*, 2 *B.* & *A.* 171. and 1 & 2 *G.* 4. *c.* 23. § 1, 2.

(1) 1 *Swanst.* 92. 1 *Wils. Ch. R.* 55. S. C.

the court held that it could not be construed into "an order declaring the *exact amount*" to which such rent was to be increased. Held also, that the commissioners having made minutes in writing of their proceedings, the defendant could not be let in to shew by parol evidence that the allotments were made at an earlier period than appeared by the award, no search or inquiry having been made after such minutes or proof given that they were destroyed. The proceedings were the legal evidence of the fact when such allotments were made. (2)

An inclosure act directed that in lieu of tithes a corn rent should be payable to the person having possession and occupation of the lands. Part of the lands inclosed were uncultivated and untenanted for some years, during which time the owner lived on another estate. He afterwards demised them to a tenant who entered and occupied. Held, 1*st*, That the corn rents were due for the time during which the land was unproductive; and, 2*dly*, that during that time the landlord was legally in the possession of the lands, so as to be liable to the burthens imposed by the act, and that the tenant coming under him was liable to be distrained on for the arrear of rent. (3)

By 41 *Geo.* 3. (U.K.) *c.* 109. § 38. The rector or vicar of any parish in which lands intended to be inclosed are situate by indenture under his hand and seal, with consent of the bishop of the diocese, and of the patron, may lease their allotments for not exceeding 21 years, commencing within 12 calendar months next after the award, so that the rents shall be reserved to the incumbent for the time being by four quarterly payments, and shall be the most improved rents that can be had without taking any fine or other consideration for granting such lease, a counterpart of which shall be executed by lessee; and no such lessee shall be made dispunishable for waste by express covenant; and power of re-entry on non-payment of rent shall be reserved in such lease.

By 1 & 2 *Geo.* 4. *c.* 23. § 4. Whenever any leases to be granted by any incumbent under the above enactment shall by any means become forfeit or void, or are surrendered before expiration of the term, then the incumbent, with previous consent of the ordinary and patron, may grant a new lease of the lands so demised for such term of years as shall at the time of such avoidance be then unexpired of the term granted by such original lease, subject to the conditions therein then unperformed and capable of having effect.]

(2) *Bendyshe* v. *Pearse*, 1 *Brod.* & *Bing. R.* 460.
(3) *Newling* v. *Pearse*, 1 *Bar.* & *Cres. Rep.* 437.

IV. *Of* moduses, *or exemptions from payment of tithes in kind; [of compositions real;] and of custom and prescription.*

Difference between custom and prescription.

1. The difference between custom and prescription is this: *Custom* is that which gives right to a province, county, hundred, city, or town, and is common to all within the respective limits; in pleading of which it is alleged, that in such a county, or the like, there is and time out of memory hath been such a custom used and approved therein. *Gibs.* 674.

Prescription is that which gives a right to some particular house, farm, or other thing: in pleading of which it is alleged, that all they whose estate he hath in such land, have time out of mind paid so much yearly, or the like, in full satisfaction of all tithes arising on those lands. *Gibs.* 674. (1)

De non decimando.

2. Custom and prescription are either *de non decimando*, or *de modo decimandi.*

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[Spiritual persons may prescribe *de non decimando*, but laymen *in general* cannot. Exceptions.]

De non decimando is, to be free from the payment of tithes; without any recompence for the same. Concerning which, the general rule is, that no layman can prescribe in *non decimando*; that is, to be discharged absolutely of the payment of tithes, and to pay nothing in lieu thereof; unless he begin his prescription in a religious or ecclesiastical person, and derive a title to it by act of parliament. (2) As in the case of *Breary* and *Manby*, Nov. 18. 1762. In the exchequer. Mr. Breary, rector of Middleton upon the Woulds of Yorkshire, brought his bill against Mr. Manby, one of his parishioners, for great and small tithes arising from the defendant's lands. The defendant by his answer insisted, that part of his farm had time out of mind been exempt from payment of tithes of any kind, or any modus or compensation in lieu thereof; and by his witnesses proved, that no tithe, modus, or compensation, had within the memory of man been paid for such part of his farm. The court, at the hearing of the

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(1) *Bennet* v. *Read*, 1 *Anstr.* 323. 1 *Saund. R.* 340. *b. Degge*, *c.* 13. 268. And there is this difference between a prescriptive and customary modus, that the former is annexed to the lands which it covers, whereas the latter exists in notion of law, independent of the lands, by force of the custom of the district. In a prescriptive modus, therefore, the lands must be definite, and not liable to shift. And therefore a bill to establish a modus for every ancient farm, but not setting out the abuttals of each, was dismissed, although it was stated that the whole parish consisted of ancient farms. *Scott* v. *Allgood*, 1 *Anstr.* 16. *Vid. infra*, divs. 8. & 10. of this title.

(2) Besides *Breary* v. *Manby*, in the text, see *Sherwood* v. *Winchcomb*, *Cro. El.* 293. *Webb* v. *Warner*, *Cro. Jac.* 47. *Seld. c.* 13. § 2. 1 *Roll. Ab.* 653. *Allen* v. *Pory*, 2 *Keb.* 45. Bishop of *Winchester's* case, 2 *Rep.* 44.

cause, was clearly of opinion, that the mere non-payment of tithes, though for time immemorial, would not be an exemption from payment of them, without setting out and establishing such exemption to have arisen from the lands having been parcel of one of the greater abbies; and therefore decreed the defendant to account for the tithes of that part of his estate for which he claimed the said exemption. [3 *Wood's Dec.* 43.]

But all spiritual and religious persons, as bishops, deans, prebendaries, parsons, vicars (as heretofore abbots and priors), may prescribe generally *in non decimando*, for they are more favoured than lay persons; for this is still in a spiritual person, and so nothing is taken from the church: for such spiritual person was capable of a grant of tithes at the common law in pernancy. (3) And hence it is that the parson or vicar of one parish, that hath part of his glebe lying in another parish, may prescribe *in non decimando* for it; that is, (as hath been said,) to be free from the payment of any manner of tithe for the same. 1 *Roll's Abr.* 653. [*Com. Dig.* tit. *Dismes* (E 2.).]

[But an ecclesiastical person cannot decline the payment of tithes unless he prescribes in *non decimando*, and the maxim *ecclesia ecclesiæ decimas solvere non debet*, applies only as between rector and vicar of the same church. (4) But evidence that the land of a spiritual farmer has *never* paid tithes is sufficient to prove a *prescription in non decimando*. (5)]

But this general rule, that none but spiritual persons or corporations may prescribe in *non decimando*, is to be understood with several exceptions; as, first, that the *king*, as being *mixta persona*, may prescribe *de non decimando*; by the same reason that as such, he is capable of tithes. *Gibs.* 674. [*ante*, 425, 426.]

1. The king.

Also the lessee, tenant at will, and copyholder of a spiritual person, though a layman, shall in this respect enjoy the exemption of the lessor, who is supposed to reap the benefit of it, in reserving so much the greater rents by reason of such exemption. 1 *Roll's Abr.* 653. *Deg. p.* 2. *c.* 16. (6) [433]

2. Tenants and copyholders of spiritual persons.

[Hence a bishop may prescribe that he and his tenants for life, for years, and at will, as well as his copyholders, have been freed from the payment of tithes (7); nor will an interruption of the prescription, by a conveyance to a lay person, abolish it, as the land being discharged of tithes when regranted to a bishop, the pre-

(3) *Gerrard* v. *Wright*, *Cro. Jac.* 607.

(4) *Warden and Canons* v. *Dean of St. Paul's* (1817), 1 *Wils. Ch. R.* 1. 4 *Pri. R.* 65. See *Blincoe* v. *Barksdale*, *Cro. El.* 573.

(5) *Nash* v. *Molins*, *Cro. El.* 206. *Clavill* v. *Oram*, *Gwm.* 1355.

(6) *Crouch* v. *Fryer*, *Cro. El.* 784. *Wright* v. *Wright*, *id.* 475. 511.

(7) *Branche's* case, *Moor. R.* 219. *Bowles* v. *Atkins*, 1 *Sid. R.* 320. 1 *Roll. Ab.* 653. *Lincoln* (Bishop) v. *Cowper*, 1 *Leon. R.* 248.

3. [Counties, hundreds, &c. where the things are titheable by *custom* only, but not *de jure*.]

Also, a county, or part of a county (1), may well plead a custom *de non decimando*, in respect of this or that particular tithe; as hath been pleaded and allowed in the case of tithe milk of ewes, and of tithe of underwood in the wild of Kent, and in forty parishes in the wild of Sussex. But a single parish may not prescribe *de non decimando* for particular tithes; nor may any larger district plead a custom absolutely, to have their lands freed from the payment of *all* tithes, without any thing in lieu. And lest this allowance of a custom *de non decimando* to laymen, in any case, should seem to break in upon the general rule, the distinction which hath been laid down is this; that in things titheable by custom only, and not *de jure*, a county or hundred may prescribe *in non decimando* generally, for in that case they are discharged, without a custom to the contrary; so that it is but to insist upon the old right, against which the custom hath not prevailed; but for things which are titheable *de jure*, a county or hundred cannot prescribe *in non decimando*, no more than a particular person; for it would be absurd to say, that a hundred shall prescribe *in non decimando*, where the particular persons of which it consists cannot so prescribe. (2)

[Constant non-payment or retainer of tithes is not in itself a sufficient discharge as against a lay impropriator.]

It was long a question undetermined, whether a lay impropriator, as well as a clergyman, be entitled to recover the tithes without proving payment; or whether a *non decimando* may be pleaded against a *lay impropriator*: But in the case of *Benson* v. *Olive*, *T.* 1730, in the exchequer; *Pengelly* chief baron delivered it as his opinion, that a lay impropriator is under no necessity of proving payment of tithes unto him. *Bunb.* 274.

So in the case of Lady *Charlton* v. Sir *Blundel Charlton*, in the same court; lord chief Baron *Reynolds* declared it as his opinion, that there can be no prescription *in non decimando* against a lay rector, any more than against a spiritual rector, and that they are equally entitled to titles of common right; and that it is sufficient for a lay rector to set forth in a bill that he is seised of the impropriate rectory; and if he maketh out his title to that, it will be sufficient, without putting him to the proof of

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(1) This privilege extends no farther than to well known divisions of a county or district. *Croucher* v. *Collins in notis*, 1 *Saund. R.* 142. *Nagle* v. *Edwards*, 3 *Anstr.* 702. But a *parish* (1 *Roll. Abr.* 652.) or *town* (2 *Inst.* 645.) cannot prescribe in *non decimando*, and this even extends to the case of churchwardens possessing lands by prescription for repair of the church: for though ecclesiastical officers, they are not strictly spiritual persons. 1 *Roll. Ab.* 653. *Wats. Cl. Law*, 507. And see the general law of allowing customs derogatory to the general custom of the realm to larger or more important districts only. 1 *Inst.* 110. *b.* N. 2.

(2) *Hick* v. *Woodson*, 1 *Ld. Raym.* 137. 2 *Salk.* 655. *Carth.* 393. *Skin.* 560. S. C. *Gibs.* 674.

having received tithes. And to this opinion baron *Comyns* seemed to assent; but he made a distinction between one who sets up a title to the rectory, and one who entitles himself only to the tithes or any species of tithes within a parish; for in this last case, the plaintiff shall be held to strict proof, not only of his title, but also of the perception of all the tithes he set up a title to; and in [436] this present case, the plaintiff having set forth a title in sir Francis Charlton (under whom she claimed) to all the tithes in the parish of Ludford, (except such small tithes as the vicar usually received,) and not to the rectory; and the defendant denying the plaintiff's title to the herbage, and the plaintiff not being able to prove any herbage tithe ever paid, though she attempted to prove an unity of possession for above seventy years, yet the bill was dismissed. *Bunb.* 325.

And finally, in the case of the *Corporation of Bury* v. *Evans*, *T.* 1739, this point seemeth at last to have been settled; wherein it was determined, that there can be no prescription in *non decimando*, even against a lay impropriator, [without shewing the reason for it:] and that the presumption which ariseth from a constant non-payment, [or from mere retainer without colour of title,] will not be sufficient, unless the defendant can shew, either that the lands were parcel of one of the greater abbies dissolved by the 31 *H.* 8. [and *then* exempt from tithe, as in the last chapter], or that some of the impropriators had released the tithes, [by a composition real. (3)] 2 *Comyn's Rep.* 643. 654. *Bunb.* 345. (*h*)

[Nor against an ecclesiastical rector.]

[*A fortiori*, mere non-payment of a particular species of tithe, or proof that no tithes in kind have ever been rendered within living memory, is no answer to a claim by an *ecclesiastical rector*, *primâ facie* entitled to tithes throughout a parish (4), but further proof of some immemorial compensation is necessary. (5)

But if a *vicar* sue for tithes, and the parishioner, being a lay-

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(3) *Berney* v. *Harvey*, 17 *Ves.* 119. *Clavill* v. *Oram*, *Gwm.* 1354. *Slade* v. *Drake*, *Hobart*, 295.

(*h*) See also 3 *Anst.* 702. [Where it was argued that a grant of the tithes might be presumed from a lay impropriator; but the court held that *quoad hoc* there was no distinction between a spiritual and a lay rector (see *Charlton* v. *Charlton* in text), and that no grant could be presumed which would amount to a prescription *de non decimando.*] And 3 *Anst.* 945. But in the case of *Rose* v. *Callard*, 5 *Ves.* 186. Lord *Eldon* said, that he did not entirely agree with the decision of the court of exchequer, that a presumption from non-payment of tithes cannot bar even a lay impropriator.

(4) *Nagle* v. *Edwards*, 3 *Anstr.* 702. 945. *Bury* case, *supra*. *Heathcote* v. *Aldridge*, 1 *Madd. R.* 242. In *Fisher* v. *Dean*, &c. of *Christchurch*, *Bunb.* 209. the long contested question, Whether constant non-payment of tithes is evidence of an exemption against a *lay impropriator*, was agitated, but not determined.

(5) *Adams* v. *Evans*, 4 *Pri. R.* 16. See *White* v. *Lisle*, 437, note (3).

man, denies that the said tithes are due to him; in such case, unless the vicar shall prove that the tithes in question are due to him by endowment or prescription, he shall fail in his suit: and the reason is, because all tithes *de jure*, or in presumption of law, belong to the rector; and therefore the vicar shall receive only those tithes which he enjoyeth by custom or prescription, or by the endowment. 1 *Ought.* 264. 1 *Vezey*, 3. 3 *Atkyns*, 499.

De modo decimandi.

3. A *modus decimandi*, commonly called by the single name of a *modus* only, is where there is by custom a particular *manner* of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation (6), as two-pence an acre for the tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owners making it for him; sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the general [437] law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. 2 *Blac. Com.* 29.

[But in all cases a *modus decimandi* presumes a composition for tithes with consent of the parson, patron, and ordinary, before time of memory. (7) But a customary payment in lieu of tithes need not be immemorial; but whether eight years is sufficient, (as in *Bennett* v. *Treppass*, *Gilb. Exch. R.* 191, 192. 4 *Bro. P.C.* by *Tomlins*, 650. *Bunb.* 106.), or what other period is sufficient, the court would not determine. (8) Though where a modus was set up against claim of small tithes in kind, and the vicarage was *shewn* to have been endowed within date of legal memory, *viz.* in 1367, an account was decreed to the vicar. (9)

A general custom prevailing throughout a parish or district is called a *parochial modus*.

A prescription confined to a farm is called a *farm modus*.

A *parochial* modus extends to all tithes within a certain district, even over lands inclosed within time of memory, and to

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(6) Money payments may be established as a *modus*, though invariably called compositions by the witnesses, where the other evidence is sufficient. Nor is an omission in the parliamentary survey of moduses of any weight, when opposed to actual payment. *Driffield* v. *Orrell*, 6 *Pri. R.* 324.

(7) *Ord* v. *Clark*, 3 *Anstr.* 638. 2 *Woodd, V. L.* 22. 105. *Bennett* v. *Neale*, *Wightw. R.* 331.

(8) *Warden and Canons of St. Paul's* v. *Morris*, 9 *Ves.* 165.

(9) *Scott* v. *Smith*, 1 *Ves. & B.* 142. See, however, *Prevost* v. *Bennett*, 1 *Pri. R.* 236.

articles that are of modern introduction; a *farm* modus is more confined, and does not extend either to articles recently introduced, or to newly inclosed wastes or commons. (1) A *parochial modus* is rather a custom than a prescription, and may be good where a prescriptive modus covering particular lands would be bad. (2) In analogy with their different qualities, evidence of reputation of boundary is admissible in case of a parochial *modus*; but not with respect to a farm *modus*, nor on questions of prescription, except as to right of way: but proof of a fixed payment for a farm during a long period, even without mention of a *modus*, is evidence of *modus*, for the payment will be presumed to be according to right. (3)]

And this may be pleaded by the lord of a manor, for the tithes of his manor; on account of lands of the gift of one who was lord of the manor, and held by the parson and his successors time out of mind; and by a parish or hamlet, for this or that sort of tithe, by reason of lands enjoyed by the parsons time out of mind within such parish or hamlet: and, lastly, by any private person for his own lands, or part thereof, in consideration of a certain sum of money or other recompence. *Deg. p.* 2. *c.* 16.

4. A. But to make any of these a good custom or prescription, it must have the several qualifications following: As, first, every modus must be *supposed* to have had a reasonable commencement (4); and in every prescription *de modo decimandi*, it is to be intended the rate tithe was the full value of the tithe at the time of the original composition; for it cannot be presumed, that the parson, patron, and ordinary would make a composition to the prejudice of the church; [or, on the other hand, that a particular district would have encumbered itself unnecessarily, though that has been sometimes countenanced as a defence to alleged rankness of a farm modus (5)]; and if the modus do not now reach the value, it is to be intended, that either the tithes are improved, or else that money is now become of less value, which makes the present inequality. *Deg. p.* 2. *c.* 16.

Modus must have a reasonable commencement, as from real composition.

By *Composition real* is meant, where the present incumbent of

Composition real.

(1) *Scott* v. *Allgood*, *Gwm.* 1369. *Moncaster* v. *Watson*, 3 *Burr.* 1375. *Heaton* v. *Cooke*, *Wightw. R.* 282. *Bishop* v. *Chichester*, *Gwm.* 1323.

(2) *Bennet* v. *Read*, 1 *Anstr. R.* 323. 328. *n.*

(3) *White* v. *Lisle*, 4 *Madd. R.* 214. And see farther as to trial of farm modus, *infra*, 454.

(4) That is, that the composition at the time of making it was fair and equitable, though it may appear different at present. *Chapman* v. *Monson*, 2 *P. Wms.* 573. but it need not be *shewn*. S. C. *infra* in text.

(5) *Marsham* v. *Huxley*, *Gwm.* 1499. *Atkyns* v. *Lord Willoughby de Broke*, 2 *Anstr.* 397.

any church, together with his patron and ordinary (6), do agree by deed under their hands and seals, or by fine in the king's court, that such lands shall be freed and discharged of the payment of all manner of tithes in specie for ever, paying some annual payment, or doing some other thing to the ease, profit, or advantage of the parson or vicar to whom the tithes did belong. (7) And these real compositions have ever been held and allowed here in England, to be a good discharge of the payment of tithes. (*i*) And from these real compositions it is intended, that all prescriptions *de modo decimandi* first took their rise and beginning; though it is to be doubted, that most of them at this day have grown from the negligence and carelessness of the clergy themselves. [2 *Inst.* 490. *Deg. p.* 2. *c.* 20.] [and *semb.* a defence by composition may be set up on the failure of *modus.* (8)]

But now, since the statute of the 1 *El.* [*c.* 19. § 5.] (in the case
[438] of archbishops and bishops,) and the statute of the 13 *El.* [*c.* 10. § 3.] (in the case of all other ecclesiastical corporations, sole and aggregate,) it is agreed on all hands, that no real compositions, any more than alienations, can be made: since all grants are thereby expressly restrained, and made void, which are not according to the tenor of those statutes. And the only *moduses* that can grow now, must be from the inadvertency of the clergy, acquiescing in the self-same agreements from one successor to another. *Gibs.* 675, 676.

Where a real composition hath been made, if the lands discharged thereby be transferred or granted to another, the feoffee or grantee shall have the benefit of it. *Gibs.* 675. (*k*)

But it is not now necessary to shew, that the *modus* had at first a reasonable commencement; for these *moduses* having been from time immemorial, none can know but that there were such circumstances in those ancient times, as might have made such a composition reasonable, though at present they may not be discoverable. It is enough to satisfy us at this great distance of time, that the parson, patron, and ordinary, before the restrictive statutes, might bind

(6) See page 439 *c.*

(7) By reason of some land or other real recompence given to the parson in lieu and satisfaction thereof, 2 *Inst.* 490. 13 *Rep.* 40. or in consideration of a recompence made to the parson or vicar out of other lands. *Ekins* v. *Dormer*, 3 *Atk.* 534. And a 'Real composition' does not mean *a security* for payment of the composition, but *land* substituted in lieu of tithes. *Atto. Gen.* v. *Bowles*, 3 *Atk.* 809.

(*i*) [2 *Inst.* 655. The agreement must have been made between the reign of Richard I. and before 13 *Eliz. Bennett* v. *Neale, Wightw. R.* 331.] See *Ekin* v. *Pigot*, 3 *Atk.* 298. These agreements are also known to the ancient canon law. *X.* 1. 36. 2.

(8) *Leech* v. *Bailey*, 6 *Pri. R.* 508. but not the converse, 4 *Pri. R.* 608. *Wightw. R.* 324. *infra*, 439. note (8).

(*k*) Sir *W. Jones*, 369.

the revenues of the parson; and that all those moduses must have had their commencement from an instrument signed by the parson, patron, and ordinary; but there can be no colour to say, that because such instrument in so great a length of time hath been lost, therefore the modus shall be lost also. Indeed, so far the law hath gone in favour of the church, as that if the instrument which the parson, patron, and ordinary had given to a layman, owner of such a farm, to discharge the farm of all tithes, (though this would be good while the instrument could be shewn,) should be once lost; this being a privilege in *non decimando*, the privilege would be lost by the loss of the deed. [*Chapman* v. *Monson*,] 2 *P. W.* 573. [439 *a*]

[Composition real not to be presumed from usage.]

[Though immemorial custom is in general evidence even for presuming deeds against the crown, or sufficient for a jury to presume an agreement beyond time of memory in support of a *modus decimandi*; yet it is settled that a composition real cannot be established by usage alone, without producing the deed by which it was created, *or* proving by some evidence referring to such deed, that it once existed independent of mere usage. (9) For the bare fact of a parson having been in possession of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for presuming a composition real. (1) Nor in absence of that evidence, will it be proved by reputation of such an agreement having existed as the origin of the exemption claimed, though corroborated by non-payment of tithe for the district claiming the exemption. (2) Nor can a composition real be presumed from the mere fact of pecuniary payment, though from an immemorial period anterior to 13 *El.* without like proof. If there is no other evidence of composition than mere non-payment, the legal inference and presumption is, that the composition originates without deed. (3)

This rule of non-presumption in favour of the clergy, *viz.* that a

(9) See *Heathcote* v. *Mainwaring*, 3 *Bro. C. C.* 217. citing *Hawes* v. *Swain*, Exchequer sittings after T. 1789, now reported 2 *Cox. R.* 179. *Ward* v. *Shepherd and Others*, 3 *Pri. R.* 608. *Bennett* v. *Neale and Others*, *Wightw. R.* 331—363. *Bennett* v. *Skeffington*, 1 *Dan. R.* 10. *Sawbridge* v. *Benton*, 2 *Anstr.* 372. *Startup* v. *Dodderidge*, *Gwm.* 587. *Bury* (Corporation) *and Wright* v. *Evans*, 2 *Gwm.* 757. *Com. R.* 643.

(1) *Knight* v. *Halsey* in error, 2 *B. & P.* 206. 7 *T. Rep.* 86. S.C.

(2) *Chatfield* v. *Fryer*, 1 *Pri. R.* 253. *Bennett* v. *Skeffington*, 1 *Dan. R.* 10. 4 *Pri. R.* 143. S.C. And see *Dartmouth* v. *Roberts*, 16 *East*, 338. *Bennett* v. *Neale*, *Wightw. R.* 324. *Harwood* v. *Sims*, *id.* 112.

(3) *Estcourt* v. *Kingscote* (1819), 4 *Madd. Ch. R.* 140. *Robertson* v. *Appleton*, 3 *Gwm.* 1101. 4 *Wood's Dec.* 10. (cited 2 *Anstr. R.* 375. *Wightw. R.* 332. 3 *Pri. R.* 615.) *Smith* v. *Goddard*, 3 *Gwm.* 1102. *Bennett* v. *Skeffington*, 4 *Pri. R.* 143. 1 *Dan. R.* 10. S. C. and notes.

composition real having its commencement by grant within time of memory, such commencement must be shewn to have been by deed, and cannot be presumed from uninterrupted usage (as a modus may), originated in 1777 in the case of *Robinson* v. *Appleton*. (4) It has been much impugned by Mr. Baron Wood in the cases above cited. The support of the rule is derived from the maxim, *nullum tempus occurrit ecclesiæ;* for if a defence of composition real was to be supported by parol evidence of usage, every bad modus might be made a good composition real (5); and no modus would exist, or ever would be pleaded *quâ* modus, but as composition real only: and the objection of rankness would be got rid of on all occasions, while the property of the church might be alienated on the ground of prescriptions of 100 years only, arising since the time, and notwithstanding the restraining statutes of Elizabeth. (6)

The following passage in *Bennett* v. *Neale*, *Wightw. R.* 359. may elucidate the difference between a *modus decimandi* and composition real, in which originates the above rule. "Composition real has always been considered from the earliest "times as a totally distinct head of defence from a *modus decimandi*, which is a particular mode of taking tithe: but in "which case the rector has always a title to the tithes, though "he must take it by a mode that is generally in the shape of "a pecuniary payment; yet as a pecuniary payment, it is tithe. "A composition real according to the definition given of it by "*Burn*, which is perfectly correct, and is taken from ancient "writers, is a discharge from tithes: the parson who has a composition real has no longer the tithes; but he has an equiva-"lent for them: he parts with all his tithes, and it is a discharge "from them by a pecuniary payment." Thus in *Dickinson* v. *Smith* (7), a composition for tithe being a *personal demand*, and not a lien on the land, the court refused a motion for its being paid out of a fund in court paid in by the sequestrator. But if *tithe* had been due in respect of the produce of the land taken possession of by the sequestrator, such a motion would have been correct, for he could not justify taking it without paying the tithe. Again, where a defendant has set up a defence of *composition real*, he cannot afterwards rely on its being in fact a modus, for such a defence is double and too uncertain. (8)

(4) *Gwm.* 1101. *Wightw. R.* 348.

(5) See *Phill. on Ev.* 3d ed. 124. *Gwm.* 1345. *Hawes* v. *Swaine*, 4 *Wood's Dec.* 313. *Wightw. R.* 349. *et seq.*

(6) See *Ward* v. *Shepherd*, 3 *Pri. R.* 625. 608.

(7) 4 *Madd. R.* 177.

(8) *Ward* (Clk.) v. *Shepherd and Others*, 4 *Pri. R.* 608. *Bennett* v. *Neale and Others*, *Wightw. R.* 324. Wood B. *dissentiente*. *Leech* v. *Bailey and Others*, 6 *Pri. R.* 508, 509. quotes *Bishop* v. *Chichester*,

Since the statute of 13 *El.* for preventing the alienation of ecclesiastical estates, no composition real can be made, and those appearing to be of a later date are invalid. The length of enjoyment, which in other cases is the best possible title, serves here only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. (9) So that though the law allows of a layman's being discharged by grant, when it appears; yet if it appears not, it is presumed that it never was, because of the dangerous consequences of presuming the contrary (1), and the law, says lord *Coke*, has great policy therein; for that laymen (to the trial of whom all prescriptions are to be put) will rather strain their consciences for their private benefit, than yield to the church the duties that belong thereto, and the decay of the revenues of men of holy church will in the end be overthrown. (2)

But the *consent of the patron and ordinary* may be given by several deeds, the actual production of which is not necessary if other proofs warrant a presumption that they once existed. (3) It may be inferred from length of time (4), or where there has been no dispute on the subject within living memory, with clear evidence of continued perception of tithes from all time which written evidence can reach, according to the copy of a grant produced. (5) In this latter case, though there was evidence enough to conclude that the composition real had been entered into prior to 32 *H.*8. *c.*7. which gave to laymen the right to sue for and recover their tithes, which by common law they were unable to do, C. B. *Richards* said, That had it been necessary to presume that the composition real was made subsequent to 32 *H.*8. he should have felt himself bound to presume that it had been re-executed and re-assented to after that time.]

[*Modus* how established at the present day.]

Upon the whole, no modus can be established at this day, but by act of parliament. An agreement by parson, patron, and ordinary, confirmed and established by a decree in equity, can only bind the parties thereto [and not the succeeding incumbent]; because no man's property can be affected but by the law

4 *Gwm.* 1329. contra: but the inclination of the Chief Baron, seemed against it, as a practice of modern introduction.

(9) *Lord Petre* v. *Blencoe*, 3 *Anstr. R.* 945. *Rose* v. *Calland*, 5 *Ves.* 186.

(1) *Slade* v. *Drake*, *Hob.* 297. *Jennings* v. *Lettis*, *Gwm.* 952. *Nagle* v. *Edwards*, 3 *Anst.* 702. *Meade* v. *Norbury*, 2 *Pri. R.* 338. *Fanshaw* v. *Rotheram*, 1 *Eden. R.* in notes, 303.

(2) *Bishop of Winchester's* case, 2 *Rep.* 44.

(3) *Sawbridge* v. *Benton*, *Gwm.* 1397. 2 *Anstr. R.* 372. And see *Read* v. *Brookman*, 3 *T. Rep.* 151. *Chaplin* v. *Bree*, 2 *Rayner*, 643.

(4) 2 *Anstr. R.* 379.

(5) See *Ridley* v. *Storey*, 1 *Dan. Exch. R.* 168. 157.

of the land. As in the following case, June 17th, 1765. Between his majesty's attorney-general at the relation of *John Blair*, doctor of laws, rector of Burton Coggles in the county of Lincoln, and the said *John Blair* in his own right, plaintiffs; *John Cholmly* Esq., *John Hopkinson* and *George Nidd*, and *John lord bishop of Lincoln*, defendants. — By the lord chancellor *Northington*: This is an information brought by the attorney-general, at the relation of Dr. Blair, for an account and payment of tithes in kind. The claim of the rector arises *de communi jure*. The defence set up against the claim, is first an *agreement* entered into in the year 1664, between the then rector and the owners of the lands in the parish, for accepting a yearly sum of 80*l.* in lieu of tithes. But I am of opinion that the agreement on the face of it is unequal, as to the consideration thereby agreed to be paid to the rector; for it appears that the agreement was entered into in order to effectuate an inclosure of the open fields in the parish, and no consideration is given as to the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit. But I am clear, that even if the agreement was equal, it would not bind the successor in the rectory, but would be void as against him. (6)

The next defence set up against the plaintiff's claim, is a *decree* in 1677, which appears to be made in a cause instituted by consent between the same parties that were parties to the agreement in 1664. For as to the bishop of the diocese being a party, I consider him as set up merely for form. And it is material to observe, that the parties themselves did not consider the agreement which had been executed as binding on the rector; for they considered the annuity of 10*l.* as not being an adequate consideration for the rector's having given up his tithe in kind; and therefore they entered into a new agreement of allowing him an addition thereto of 16*l.* 8*s.* 7*d.* *per annum*: and on being allowed that addition, the rector by his answer consents to have the agreement established. It is true, that the decree founded on this agreement doth *in verbis* bind the successors, in the rec-
[440] tory: but this was a decree founded on an agreement, which the court never enters into the propriety of, when a bill is brought by consent of parties; and all such decrees are drawn up by the register of the court in the words of the agreement, as a matter of course. But I am of opinion, that such decree cannot bind the successor. The defendant's counsel have, it is true, cited cases of a similar nature, and urged the case of *Egerly* and *Price*, reported in *Finch's Reports*, which I have looked into, and think it a very extraordinary one, for the judge to send for the parties to attend him. I can pay no credit to that case, nor do I look

(6) *Mortimer* v. *Lloyd*, 7 *Bro. P. C.* 44. S.P.

on it as any authority, but only the dream of some note-taker in this court.

The agreement and the decree being laid out of the case, the next consideration is, whether a court of equity can relieve in the present case. And I am of opinion, there is not a better rule than *Equitas sequitur legem.* It is a fixed rule, that the church cannot be prescribed against; the first, on account of its high dignity; the second, on account of its imbecility, *Quia fungitur vice minoris, conditionem suam meliorare potest, deteriorare nequet.* At common law, although the church could alienate with consent of patron, parson, and ordinary; yet it was under various restrictions. The patron must be absolutely seised in fee-simple: if he was seised only of a fee-simple conditional, or base fee, the alienation was void. In the present case, the bar set up by the defendants amounts to a mode of alienation. And if the decree is void, as I am of opinion it is, what then is there to send to law, when the point is about the extent of a decree of this court? And if it were sent thither, it must come back to be ultimately determined here.

It has been also objected, that the length of time ought in this case to bar the plaintiff. But I think the legal rule, that no prescription can run against the church, must be adhered to. And indeed the length of time in which this agreement was acquiesced under, is not so great as at first sight it appears, for the person who was rector in 1677, and party to the decree, and had a right to establish the agreement during his life, did not die till the year 1718.

Upon the whole, the inclosure of the lands was for the general benefit of the parish; and such lands will be continually increasing in value, while the composition given to the rector in lieu of tithe will be gradually diminishing in value. The composition here regardeth only the value of the past tithes, without any [441]
regard to the future increasing value of tithes, which is always allowed for in every private bill for an inclosure. (7) If in the present case the parties had made an allowance for the future improved value of tithes, I should not have been inclined to relieve, but would have left the rector to his legal remedy.

I shall therefore decree, that the information, as against the bishop of Lincoln, be dismissed with costs: And let it be referred to the master, to take an account of the value of the tithes which have accrued from the time of filing the information, and let what shall be coming on the balance of such accounts be paid to the relator, Dr. Blair; and no costs hitherto: but I do reserve

(7) This same principle is affirmed in *Cholmley* v. *Atto. Gen.*, 7 *Bro. P.C.* 34. *Ambl.* 150. S.C. See also *Mortimer* v. *Lloyd*, 7 *Bro. P.C.* 44. *O'Connor* v. *Cook*, 8 *Ves.* 537.

the consideration of subsequent costs till after the master shall have made his report; and any of the parties to be at liberty to apply to the court as there shall be occasion. (8)

(But if instead of a decree in a court of equity, an act of parliament had been obtained to carry the agreement into execution, it would have been binding. But it might have been difficult to have obtained such an act; for a sum of money in certain, which is always fluctuating in value, cannot be deemed a compensation at all events in perpetuity.)

Temporary composition. (9)

4. B. That a parson may bind himself *by deed* to accept of a composition for tithes during life, or incumbency of a particular living, is apparent from Dr. *Blair*'s case above-mentioned. It is also very common to agree by *parol* for an annual composition for tithes. [Thus a composition by way of retainer of tithe, by parol for one year only, is good; and excuses the occupiers from the penalties given by stat. 2 & 3 *Ed.* 6. and also from costs, till notice is given of the determination of the agreement. (1) Interest accrues where it is payable on a day certain: though it is otherwise on a general agreement, for retaining tithe for so much *per ann.* where no time is specified for the payment. (2)

But a parol *lease* of tithes, even for one year only, is void. (3)

Such a composition by way of retainer by parol, is analogous to a lease between landlord and tenant, and] binds the parties to it (4) till sufficient notice given of dissent from the agreement.

[This notice (in analogy to the notice given in holding of land) must be half a year's notice, which half year must expire with the year of the composition, and the notice must be to determine the whole, and not part of the composition. (5) Thus

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(8) S.C. *Amb.* 510. This decree was affirmed on appeal, the proceedings in which are to be found in 2 *Rayner*, 523. *et. seq.*

(9) And see *Ridley* v. *Storey*, 1 *Dan. Exch. Rep.* 157.

(1) *Breamer* v. *Thornton*, *Hardr. R.* 203.

(2) *Shipley* v. *Hammond*, 5 *Esp. N.P.C.* 114.

(3) *Keddington* v. *Bridgman*, *Bunb. R.* 3. *Hewit* v. *Adams*, 7 *Bro. P.C.* 64. Yet where the lessee has continued to farm tithes under a parol agreement after the lease was expired, and received the tithes accordingly; *semble*, the rector would not be entitled to recover them again from the occupier. *Leathes* v. *Newitt*, 4 *Pri. R.* 372. As to evidence of title to tithes by merely proving payment of a composition for tithe in a preceding year, see *Garson* v. *Wells*, 8 *Taunt. R.* 542. *Hartridge* v. *Gibbs*, *Sel. N.P.* 1250. 5th ed. 1212. 4th ed.

(4) In *Breamer* v. *Thornton* it is said that it will not bind the parson, but will excuse the parishioners from the penalties of 2 *Ed.* 6.

(5) *Wyburn* v. *Tuck*, 1 *Bos. & P. R.* 465. *Reynell* v. *Rogers*, *Bunb. R.* 15. *Bishop* v. *Chichester*, *Gwm.* 1316. 2 *Bro. P. C.* 161. (citing *Adams* v. *Hewitt.*) 3 *Rayner on Tithes*, 965. *et seq.* *infra* IX. note. *Morgan* v. *Church*, 3 *Campb. R.* 73. *Reynel* v. *Rogers*, *Bunb. R.* 15. *Doe*, dem. *Pitcher* v. *Donovan*, 2 *Campb. R.* 78. *Duke of Bedford* v.

where a composition for tithes subsisted from year to year, such year commencing at Michaelmas, and a notice to determine the composition was given only one month before Michaelmas day, the judges were unanimous that the notice was insufficient. (6) And notice served on 29th *Sept.* to determine the composition on the 25th *March*, or at *Michaelmas* to quit on the Lady day following, is sufficient. (7) If the lessee of tithes for one year underlets them to the several occupiers of the land, no notice to determine the underletting need be given by another lessee of the same tithes for the following year. (8) Or where an occupier, having been under a composition for his tithes, refuses to set out the tithes in kind, alleging that he is exempted by a modus, this disclaimer of the tithe-owner's title to tithe in kind, renders the proof of notice unnecessary, as he may recover in ejectment without proving a notice to quit, where there is evidence that the lessee has disclaimed his title. (9) And parol evidence of the defendant's denial of the plaintiff's right, is a sufficient notice of the determination of the composition. (1) The object of giving notice of determining a composition is the farmer's convenience, that he may not be taken by surprize: it should therefore be reasonable, and a parol notice at the time of settling, that "for "the time to come," plaintiff would require tithes in kind, was held sufficient, where half a year would elapse before they would again be payable. (2) A general allegation in an answer, "that "defendants could not be affected by the notice in any way," is not sufficient intimation to plaintiff, that defendant intended to rely on the insufficiency of the notice. (3) An agreement with the agent of the proprietor of tithes will bind the principal. (4) The parishioner who has compounded with the parson one year for his tithes, and has not determined the composition, cannot set up as a defence to an action for the next year's composition money, that the plaintiff is *simoniacus*. (5)

In ejectment against lessee of tithes, for holding over after

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Knightley, 7 *T. Rep.* 63. See the old Decisions, *Breamer* v. *Thornton*, *Hardr. R.* 202. per *Price* B. *Bunb. R.* 15.

(6) *Hewit* v. *Adams*, 7 *Bro. P.C.* 64. *Atkins* v. *Lord Willoughby*, 2 *Anstr. R.* 397. S.P.

(7) *Doe*, dem. *Harrop* v. *Green*, 4 *Esp. N.P.C.* 199. 7 *T. R.* 63.

(8) *Cox* v. *Brain*, 3 *Taunt. R.* 95.

(9) *Bower* v. *Major*, 1 *Brod. & Bing. R.* 4. 3 *Moore's R.* 216. (overruling the case of *Kensington*, 2 *Rayner on Tithes*, 992.) *Leech* v. *Bailey*, 6 *Pri. R.* 510, 511. *Throgmorton* v. *Whelpdale*, *Bull. N. P.* 96. *a.*

(1) *Ib.*

(2) *Leech* v. *Bailey*, 6 *Pri. R.* 510, 511.

(3) *Bennett* v. *Neale and Others*, *Wightw. R.* 324.

(4) *Chave* v. *Calmel*, 3 *Burr. R.* 1873.

(5) *Brooksby* v. *Watts*, 6 *Taunt.* 333. 2 *Marsh.* 38. S. C.

expiration of a notice to quit, some evidence must be given to shew that he did not mean to quit the possession: *as*, by his declaration to that effect, or even his silence when questioned about it: or, as it seems, by shewing that the defendant (who claimed by assignment from the original lessee) had entered into the rule to defend as landlord. (6)

[Composition determinable by death of incumbent, and how apportioned if continued by successor.]

All compositions of this kind are determinable by the incumbent's death, and no notice therefore can be necessary on the part of the successor. But where the successor adopts the composition, then it will amount to a confirmation, so far as to oblige him to give notice of his renouncing it, which must be the regular notice above specified. (7) The analogy to the case of landlord and tenant already acted upon, as to notice of determining a composition was continued by Sir Thomas Plumer, when vice-chancellor, in a case where, from the successor *continuing* the same composition, it became a question what proportion of the composition, and with reference to what rate, the executors of the last incumbent were entitled to receive it: and in which it was held, that it was to be paid to them *pro ratâ*, according to the time elapsed since the last payment before the death. (8) But in a former case in K. B., it was held that if the successor continued to receive the next payment after the death of his predecessor, he can only be accountable to the executors for such a portion as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death would have amounted to, and not *pro ratâ* as above. (9)]

Must be something for the parson's benefit.

5. The modus must be something for the benefit and interest of the parson, [and not for the emolument of third persons only (1): and therefore repairing the church and not the chancel; immemorial payment of 5*s*. to the parish clerk, where it was not shewn that it was incumbent on the parson to find the clerk (2), a prescription of having found straw for the body of the church in discharge of tithe hay (3); of having time out of mind repaired the church in discharge of the payment of all tithes (4); or finding a rope for a bell; or paying a quit rent to the lord of the

(6) *Doe*, dem. *Brierley* v. *Palmer*, 16 *East*, *R*. 53.

(7) *Brown* v. *Barlow*, *Gwm*. 1001. *Doe*, dem. *Martin* v. *Watts*, 2 *Esp*. *C.N.P*. 501.

(8) *Aynsley* v. *Wordsworth*, 2 *Ves*. & *Bea*. *R*. 331. (1813.) *Anon*, *Bunb*. 294. See *Paget* v. *Gee*, *Ambl*. 198. *Vernon* v. *Vernon*, 2 *Bro*. *C.C*. 659. *Hawkins* v. *Kelly*, 8 *Ves*. 308. *Whitfield* v. *Pindar*, cited *ib*.

(9) *Williams* v. *Powell*, 10 *East*, 269. (*Nov*. 10. 1808.) And see *infra*, 551.

(1) 1 *Roll*. *Ab*. 649. *Portinger* v. *Johnson*, *Gwm*. 286.

(2) *Savel* v. *Wood*, *Cro*. *El*. 71. *Moor*, *R*. 908. 1 *Leon*. 94.

(3) *Scory* v. *Baber*, *Gwm*. 163.

(4) 1 *Rol*. *Abr*. 649.

manor (5), when urged as discharges from tithes in kind, have all been held invalid moduses. But if the parson had been bound by custom to find the clerk, or had the straw been procured and laid in the chancel instead of the body of the church, the prescription might have been good, as beneficial to the parson. Thus,] therefore, the finding straw for the body of the church, the finding a rope for a bell, the paying five shillings to the parish clerk, the paying a quit rent to the lord of the manor, when these have been urged as discharges from tithes in kind, the moduses have been held not to be good. *Deg. p.* 2. *c.* 16.

It is a good modus to be discharged, for that he hath used time out of mind to employ the profits for the reparation of the *chancel;* for the parson hath a benefit by this. 1 *Roll's Abr.* 650.

[A custom, that the landowner should take the best out of every ten lambs, and the tithe owner the next best, is invalid, *Richards*, C. B. saying, "This is not a modus: it is, if any thing, "a manner of paying tithes in kind; for it proposes to the parson "to take one in ten; but it is a departure from the usual mode "of rendering tithes: It is not more beneficial to him; on the "contrary there is no consideration for the custom moving to "the tithe owner, nor is there any provision made under the "custom, as stated, for any lambs under or above ten." (6)

But where the farmer does more than the law compels him, the law often gives him the privilege of paying less; and whether there has been a little more advantage on one side or on the other is immaterial. (7) It is enough that there is a consideration for the deduction, and the exact *quid pro quo* in these compensations will not be nicely balanced.]

Must not be one tithe in lieu of another.

6. The modus must not be one tithe paid in consideration of another; as, it must not be to pay tithes of other kinds, to be discharged of tithes for dry cattle; it must not be so much for every cow and calf, for the tithe of herbage. *Deg. p.* 2. *c.* 16.

[Thus a payment of the tenth sheaf of corn, the tenth cock of hay, the tenth fleece of wool, the seventh calf, and the parson to pay 1½*d.*; and the eighth calf, if he had eight, and the parson to pay 1*d. et sic usque ad decem:* and if he had under seven to pay only ½*d.* for every one, and so after that rate for lambs and colts; and that it was *in satisfaction for all tithes of corn, hay, and cattle* (8), 1*d.* for every milch cow by the year, and ½*d.* for every other cow *per ann.*, in recompence and discharge of all tithes of cows, oxen, steers, and calves; 1*d.* for every mare, in discharge

(5) *Gibs. Cod.* 674.
(6) *Hall* v. *Maltby*, 6 *Pri. R.* 255. *Layng* v. *Yarborough*, 4 *Pri. R.* 383.
(7) *Cockburne* v. *Hughes and others*, 3 *Pri. R.* 428.
(8) *Ingoldsby* v. *Johnson*, *Cro. El.* 786.

of all tithes of horses, mares, and colts (9); 1*d.* for every milch cow, in satisfaction for tithe of milch kine and beasts agisted (1); 1½*d.* for every cow having a calf, up to five cows: 1*s.* 4*d.* for five cows having calves: 2*s.* 6*d.* for six cows having calves: 2*s.* 8*d.* for 10 cows having calves: 1*d.* for every cow having no calf; 1*d.* for every milch cow: in satisfaction of all the tithes of cows, calves, and herbage, and pasture of their lands within the parish. (2) A modus to pay a whole week's meal on a certain day, and on every ninth and tenth night and morning after, till a young lamb yeaned be heard to bleat, in lieu of tithe of milk (3): have been all held void moduses, upon the principle, that a payment of one species of tithe can be no discharge for the payment of another. But though a payment of one species of tithe in discharge of another is bad, a payment of one species of tithe in discharge of the land may be good. (4)]

E. 1729. *Fox and others* v. *Ayde and others.* A bill was brought in chancery, to establish a modus, in favour of the inhabitants of the parish of Sturton in Nottinghamshire. The modus was, in consideration that after the grass was cut the parishioner at his own costs and charges did make the tithe grass into hay, by strowing the grass on the ground (which is called tedding of it), and afterwards gathering it into week and windrows; therefore the persons that inhabiteth within this parish (which parish appeared to be the greatest part thereof meadow land) were to pay no tithes for the herbage of dry and unprofitable cattle. But though it was proved in the cause, that the parishioners time out of mind had paid no tithe of this herbage, yet there was no evidence that this excuse for not paying tithes of herbage was in consideration of the parishioners making the tithe grass into hay. On the other hand it was proved, that foreigners living out of the parish made the tithe grass into hay as well as the inhabitants, and yet paid tithe herbage. And it was proved by the plaintiffs, that the grass was tedded and spread, and not divided into heaps or cocks, until the same was made into hay. By *King*
[443] lord chancellor: 1. This may be a good custom or modus, to excuse the occupier of the same land wherein the petitioner made the grass into hay, from paying tithes for the after herbage: but it can be no good modus, to excuse the herbage tithe of other land: for at that rate a man might mow and make into

(9) *Grysman* v. *Lewes, Cro. El.* 446.
(1) *Sherington* v. *Fleetwood, Cro. El.* 475.
(2) *Morton* v. *Briggs, Gwm.* 561. 2 *Lutw. R.* 1037.
(3) *Hill* v. *Vaux,* 2 *Salk. R.* 656. 1 *Ld. Raym.* 358. *Carth. R.* 461.
(4) *Cowper* v. *Andrews, Hob. R.* 44. *York* (Archbishop) v. *Newcastle* (Duke), *Gwm.* 583. *Salk.* 656. *Sharpe* v. *Sharpe, Noy's R.* 148.

hay only a small parcel of ground, containing a quarter or half an acre of land, and by this means be excused from the tithe herbage of a hundred head of cattle. 2. It seems to be a material objection against this custom, that foreigners living out of the parish, though they have no privilege of being tithe free as to their herbage, yet have made the tithe grass into hay; which looks as if it was the usage of that parish, for the parishioners to make their grass into hay of course. 3. It seems material what some of the witnesses have proved, that in this parish the parishioners, when they cut down the grass, did not divide it into ten parts, until such time as they had made it into hay: for, of consequence, the parson could not have any opportunity of making his tithe grass into hay himself. And the bill was ordered to be dismissed with costs; but without prejudice as to any litigation that may be made touching the same at law. 2 *P. Will.* 522. [and *Fitzgib.* 52.]

7. It must also be something in its kind different from the thing that is due (5); and therefore a load of hay in lieu of tithe hay, or certain sheaves of corn for all tithes of corn, is not a good prescription (6): but it hath been said, that this holds only in

Must be different in kind from the thing that is due.

(5) *Berd* v. *Adams*, *Moor. R.* 278. Unless payable in another manner, so that the parson has benefit thereby. *Hill* v. *Vaux*, 2 *Salk.* 656. 1 *Ld. Raym.* 358. *Carth.* 461. See *infra*.

(6) For no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. Thus a modus to take a part of the tithes for the whole has been always held a void custom. *Hayter* v. *Stapleton*, 2 *Atk. R.* 138.

Thus 1*d.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle; for tithe is due of both. *Grysman* v. *Lewes*, *Cro. El.* 446. So a modus of every tenth meal of milk during certain months in the year, in kind, in lieu of all the tithe milk of the year. *Brinklow* v. *Edmunds*, *Bunb.* 307.; tenth shock of corn for all corn; load of hay in lieu of all tithe hay. 2 *Leon.* 70.; certain sheaves of corn for tithe of the whole corn; 1 *Roll. Ab.* 651. *Gibs. Cod.* 675. are all void: for the law does not consider it possible that a parson would *bonâ fide* have entered into a composition to receive less than his due in the same species of tithe. Thus it is evident a modus to take a part for the whole must ever be held a void custom. *Hayter* v. *Stapleton*, 2 *Atk. R.* 138. So a modus in consideration of paying the tenth of all the lambs dropped in the parish, to be discharged of tithe for lambs fed there, is bad. A custom for any parishioner who should feed his sheep with his grass till June and August, to mow his coarse grass without paying tithe for it, is bad. *Selby* v. *Clarke*, 1 *Ld. Raym.* 677. But this rule only applies where things are payable of common right, and not to things whereof tithe is only payable by custom, as fish, or cheese. See next note.

case the things are *de jure* tithable, and not by custom only. *Deg. p.* 2. *c.* 2. (7)

M. 3 *An.* In the exchequer: *Archbishop of York* against the *Duke of Newcastle.* The prescription was, to pay ten fleeces of wool and two lambs in lieu of all tithes. And *Price* and *Bury* barons were of opinion that this was an ill modus: because it is one species of tithe for another; and there is great uncertainty, for one fleece may be twice as big, and three times the value of another. But *Ward* chief baron and *Smith* baron were of the contrary opinion; for that a modus is nothing but a real composition for or in lieu of tithes; or an annual profit certain and permanent: and they held, that the payment of any one chattel for tithe was or might be a good modus as well as money; for why might not the parson originally agree to take ten fleeces for his tithe, as well as a penny? They admitted that payment of tithe of one species, or payment of a modus for one species of tithe, could not be a discharge as to another species: but they held, that this was not a payment of tithe, nor a payment for a species of tithe; because it was to be paid at all events, whether
[444] there be sheep or no; and they denied the case of 1 *Roll's Abr.* 651. and held it no more uncertain than to pay a modus of ten cheeses, which may differ vastly both in nature, quantity, and value; and it tends to the disquiet of the country, to break in upon customs and usages, and it ought not to be done, but on plain and manifest reason. 2 *Salk* 656. *Gwm.* 583.

T. 9 *G. Mason,* rector of Luggershall in Bucks v. *Holton.* The defendant insisted, that a small meadow had been always enjoyed by the rector, in lieu of the tithe hay of another very large one. It appeared that the first bore, one year with another, about four loads of hay, the other about 150. The court said, it could never be supposed, that any men in their wits would agree, to take four loads instead of 15. And the modus was set aside as unreasonable.

[This rule does not apply where, though the compensation is of the same nature with the thing compounded for, the tithe is rendered in an ameliorated or ulterior state. Thus a modus of every tenth day's cheese for twenty weeks from Holyrood day, in lieu of tithe of milk, is good *comm. semb.* (8) A modus, whereby in consideration that the parishioner made the grass growing in a particular place, and then paid the tithe, by way of discharge for the payment of the balks or hades: (9)

(7) Thus *per cur.* in *Sheppard* v. *Penrose,* 1 *Lev. Rep.* 179. tithes of fish are not due without custom, for which reason a custom to pay less than a tenth part may be good; so of cheese, for that comes by labour. *Austyn* v. *Lucas, Cro. El.* 609.

(8) *Wake* v. *Ross,* 1793: 1 *Anstr. R.* 295.

(9) *Wood* v. *Symons, Heil. R.* 147.

or that he has cut, dried, and shocked the corn, in lieu of the payment of tithe hay the following year; were held good moduses. So where an immemorial cu[illegible] was shewn for the rector to take the eleventh shock of wheat, [illegible]ting of six or nine sheaves, which the farmer used to put into sh[illegible]ks, and in case of bad weather to open them to dry; it was he[illegible] that the tithe wheat, which is at common law titheable in the [illegible] (1), was uniformly advanced to a further stage of labour [illegible]ing put into shocks, by which it was better protected from the weather; which, as a benefit to the rector acquired by the additional labour of the farmer, after the corn was tithable, constituted a good consideration for rendering the eleventh instead of the tenth shock of wheat. The same custom was found as to barley, oats, peas, and vetches; but the barley and oats, being merely put into cocks, and not tithable till then, the occasional opening them in the accidental event of wet weather did not amount to an equivalent for the deduction claimed. The mere labour of ventilation was too uncertain and minute to warrant departure from the common-law right. It was a matter of accident whether any thing beyond what was required by the common law would be done; and the mere probability of extra trouble is not a sufficient consideration to warrant the custom. As to the peas and vetches, there was no evidence of the opening them again, which would indeed have injured them by the shaking. (2)

The legality, however, of commuting the tithes of one species of tithable matter by render of another, or *by service and labour connected*, as render of the tenth river or rider of *corn*, in lieu of the tithes of corn *and hay*, has been questioned. (3)]

Must be certain, [with reference to description. See *infra*, 10., for certainty, as to *duration*.]

8. Every modus must be certain [and incapable of variation at the will of the tithe owner or occupier (4)]: and if it is uncertain, no length of time will make it good. Thus a prescription to pay a penny, or thereabouts, for every acre of arable land, is void for the uncertainty. (5) [A payment of different sums will prove it to be no modus; that is, no original real composition, because that must have been one and the same from its first origin to the present time. (6) The rule of law is, that a modus ought to be as certain as the duty which is destroyed by it. (7) Thus a modus cannot be laid in the alternative, and it is still more ob-

(1) *Knight* v. *Halsey*, 7 *T. R.* 93. See 2 *Taunt.* 58. *Shallcross* v. *Fowle*, 13 *East*, 267.
(2) *Smith* v. *Sambrook*, 1 *M. & Sel.* 66. 74.
(3) *Legh* v. *Glegg*, 8 *Pri. R.* 492.
(4) *Baudink* v. *Bushel*, 1 *Keb.* 602. *Mirehouse on Tithes*, 2d *ed.* 170.
(5) *Chapman* v. *Monson*, 2 *P. Wms.* 572.
(6) 2 *Bla. Comm.* 29, 30.
(7) *Hardcastle* v. *Smithson*, 3 *Atk.* 245. (and see *infra*, 10.)

jectionable in pleading a composition. (8) An agreement to accept a reasonable composition, *not exceeding* 3s. 6d. an acre, is bad for uncertainty; and an agreement with a landlord to accept a composition from his tenant is not binding. (9)]

Thus in the case of *Blacket* and *Finney*, *T.* 1725: On a bill to establish a modus, *payable on or about the twenty-fifth day of April yearly;* it was objected to the uncertainty of the time of payment: And the court allowed the objection, but gave the plaintiff liberty to amend, upon paying the costs of the day. *Bunb.* 198.

So also, a modus *to pay four shillings for every day's ploughing of wheat*, and *two shillings for every day's ploughing of barley*, hath
[445] been adjudged to be ill; it being uncertain how much every day's ploughing was. 2 *P. Will.* 462. 2 *Salk.* 657. (*l*)

So, in the case of *Bean*, vicar of Lydd in Kent, *T.* 12 *An.* The defendant insisted on a custom to pay *one shilling in the pound according to the rent, when their land was let to the full value, or at rack rent; when it was not let, or let and a fine taken, then according to the value.* After a full debate on both sides, it was decreed to be a void modus. This decree was cited 1 *Geo.* in the case of *Shapter*, vicar of St. Goram in Cornwall, v. *Mitchell*, and allowed of for this reason, that it exposes the parson to be greatly imposed on, who cannot know what rent is reserved, nor what fine is taken; and as to the value of the land, that is still more uncertain. [*Byne* v. *Dodderidge*, 2 *Lord Raym.* 696. S. P.]

M. 11 *G. Webber* and *Taylor*. A bill was brought to establish a modus; which was laid thus: *For payment of such a sum of money, while the lands are in the hands of the proprietors; but if in the hands of any other person, to pay tithes in kind, or the money, at the election of the parson.* Lord chancellor *King* said, that he would never establish a modus against a parson without a trial at law, if he desires it; but this modus is clearly ill, for a modus cannot be desultory. *Cas. Cha. King*, 52. (1)

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(8) *Leech* v. *Bailey*, 6 *Pri. R.* 508.

(9) *Brewer* v. *Hill*, 2 *Anstr.* 413.

(*l*) No such matter is mentioned in either of these books, as is observed in *Rayner, Introd.* xliii. But the case alluded to by the author is *Took* v. *Ledgeird*, 1 *Keb.* 612., where a prohibition was refused on the suggestion of the modus here mentioned; but it was said, that if the modus had been *so much for every day's work, with an averment that it was certainly known, and how much it contained*, it would have had sufficient certainty.

(1) The following moduses have been deemed void in law for *Uncertainty* with reference to *description*:—A modus *to pay a tithe-penny, or a penny per ann., or thereabouts, for every acre of land*. *Chapman* v. *Monson*, 2 *P. Wms.* 572. A payment of 1s. *in the pound on the yearly rent of rack-rented farms*. *Bean* v. *Lee*, *Gwm.* 609. *Harrison* v. *Sharp*, *Bunb.* 174. 2 *Wood's Dec.* 224. So of a payment of 2s. *in the pound*

But in the case of *Chapman* and *Monson*, *H.* 1729: A modus, *that every occupier of land within the parish, living out of the parish,*

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on the true improved yearly rent or value of the land, or a proportion of the true improved yearly value; it might be certain enough for a tenure or a contract; yet it is not so certain that in consideration of it the court would adjudge that the parson ought to be barred of his tithes in kind. *Startup* v. *Dodderidge*, *Ld. Raym.* 1058. 2 *Salk.* 657. 11 *Mod.* 60. Thus a modus of 3*d.* claimed *by the occupier of every oxgang of land*, which oxgang was said to contain 16, or about 18 acres, of arable, meadow, and pasture land, *in lieu of the tithe of hay arising on the said oxgang*, was set aside for uncertainty. An oxgang itself is indeed hardly a certain term; it will contain a quantity of land, more or less, according to its quality, in different parts of the parish: and in this case there was no specification of proportions. C. B. *Eyre* observed, that by the fluctuation of lands in this parish it may happen that the arable may be occupied separate from the meadow or pasture: as, for instance, suppose the number of acres in this parish would make 100 oxgangs at 16 acres each, and that each consisted of meadow, pasture, and arable land, there would be then 100 three-pences to the vicar in satisfaction of his tithe for the meadow. But suppose one half of these oxgangs to have no meadow, and the whole meadow to be distributed among the other 50: in that case the vicar would have but 3*d.* for every oxgang containing meadow; and therefore but 50 three-pences. *Markham* v. *Laycock*, *Gwm.* 1339.; better stated in *Mirehouse*, 166. In like manner, 4*d. by each occupier having lands cultivated by the plough with three or more horses, usually called a plough, in lieu of all small tithes of such lands so cultivated*, where there was no averment of what quantity of land a plough consisted, has been held void. *Blackburn* v. *Jepson*, 17 *Ves.* 477. Again, a payment *of a fother of hay* (i. e. as much as two oxen and two horses could draw) *in lieu of all tithe hay*, was set aside; as the quantity of hay depends on the condition of the soil, the weather, the goodness of the oxen and horses, and the will of the occupiers, all uncertain. *Fenwick* v. *Lamb*, *Gwm.* 869. A modus of 4*s.* payable at Easter, *in lieu of tithe hay of a farm*, it not being settled of what a farm consists (*Burwell* v. *Coates*, *Bunb.* 129.); of a meadow called the parson's meadow, and the enjoyment of several beast grasses by the tithe owner and his predecessors, in lieu of tithes (*Buck* v. *Stone*, *Gwm.* 649.); of 1*d.* per cow for milch cows *summered* on lands within a parish (*Rumney* v. *Beale*, 1 *Dan. R.* 35.); to carry a *cart load* (which as it may be drawn by two or ten horses must ever be variable) of peat and turf to the parsonage house, in full discharge of all tithe of hemp, flax, and hay (*Tully* v. *Kilner*, *Bunb.* 126.); were held bad for uncertainty. The like of a modus for tithe of hops, *that if the parson send a servant to pull some of them, he shall have the tithe.* *Stedman* v. *Lye*, 1 *Ld. Raym.* 504.

So a modus of 5*s. for every* 10 *calves, where there happens to be* 10, *and* 2*s.* 6*d. for every* 5, in lieu of the tithe of such calves, and also of the tithe milk of the cows belonging to them, called renew cows, or cows having had each a calf within the year, preceded by a modus of 1½*d. for every cow called a renew cow*, in lieu of the tithe of her milk; is bad, on the ground of inconsistency, as well as that nothing is said to

shall pay a penny an acre for all pasture land within the parish, but if he lives within the parish, to pay tithes in kind, was adjudged to be a good modus; and this was said to be the less unreasonable, because the tithes are given as a reward for the trouble and care which the parson takes of the souls of his parishioners, in which case the labourer is worthy of his hire: but then, as the parson is not bound to go out of his parish to visit those who only occupy land within the parish, so it is but reasonable that they who have not the benefit of the parson's care should answer the less duty to him. 2 *P. Will.* 565. [*Fitzgib.* 119. and *Barnard. B. R.* 292. *Moseley*, 266.]

[446] In the case of *Hardcastle* against *Smithson and Slater*, July 1745: a bill was brought by the plaintiff, as impropriator of the rectory of Coverham in Yorkshire, (amongst other particulars,) for the tithe of hay. The defendants insist, that there are and for time immemorial have been, several ancient usages and customs within the several villages, *that all* and every the *occupiers of lands and tenements therein have used to pay yearly, on St. James's day, to the impropriator of Coverham, certain annual sums of* 30*s*., 20*s*., (*and so on*,) *in lieu of all tithe hay yearly happening within the lands therein specified:* It was objected, that this modus cannot be good, for the uncertainty; and that it may charge persons with the payment of a modus for tithe hay who have no hay to pay tithe for, as persons who have only houses, wood land, arable land, and the like: and therefore it is to be presumed, that no such agreement between the parson and parishioners was ever made. Lord *Hardwicke* said, if there were a violent presumption of this kind, it might have weight. But he thought the pre-

be paid for calves up to 5, or from 5 to 10, or from 10 upwards to any quantity. *Layng* v. *Yarborough*, 4 *Pri.* 383. So where the modus is pleaded as a positive payment, but the evidence adds a material qualification, as, *that if the calf or foal was sold within a year after their being calved, &c. more should be payable to the vicar. Leathes* v. *Newitt*, 4 *Pri. R.* 370.; and see *Gwm.* 1321. 1250. Again, a modus of 1*s*. 6*d*. *in the pound, in lieu of tithe of rape-seed, when the same is sold in the seed*, is bad; both from the uncertainty of the amount, the time when it may accrue, and the opportunity it furnishes to defraud. *Layng* v. *Yarborough*. So if the payment was regulated by the poor's rates; for this is evidence of a general payment in lieu of tithes in kind. *Wright* v. *Southwood*, 1 *Dan. R.* 140. And of this the vicar's books are evidence, (*Walker* v. *Holman*, 4 *Pri. R.* 171.) if coming from the parish chest, which is a proper and legal repository. *Parsons* v. *Bellamy*, *id.* 198. *Semb.* There are three legitimate repositories of such documents: the registries of the bishop and archdeacon of the diocese, and the church chest. *Armstrong* v. *Hewitt*, 4 *Pri. R.* 218. See *Potts* v. *Durant*, 4 *Gwm.* 1406. and 2 *Pri. R.* 211.; and *ante* Terrier. Again, a custom in paying tithe of wool by the pound, and not by the fleece, is no modus. *Wilson* v. *Wilkinson*, 2 *Stra.* 782.

sumption in this case was not so strong, because the lands might be presumed to be in the hands of one person at the time when the agreement was made; and if they were in the hands of several owners, they might all probably pay tithe hay, and therefore might agree, that they would pay so much for the tithe of hay, whether they should have tithe hay or not; for as they pay it at all adventures, they have the benefit of the modus when they have hay, and they may therefore have hay if they please. And as to the uncertainty of the persons who are to pay the modus, as laid in the plea, it is well enough; for in suing for such modus it is not necessary for the plaintiff to make all the occupiers parties who pay a joint modus; for every part of the land is liable, and no occupier can be discharged till the whole modus is paid. And therefore the ecclesiastical court would be justified in determining that every occupier is liable for the whole, and for each other; and therefore suing a part of the occupiers is sufficient. 3 *Atk.* 245. (2)

(2) The following moduses have been established as good, by decisions in the courts of law: — One penny for *ancient* gardens and orchards. [*Franklyn* v. *St. Cross Hospital*, citing] *Perrot* v. *Markwick*, *Bunb.*79. [*Scott* v. *Allgood*, 1 *Anstr. R.*16. S.P.—A like modus allowed, and account decreed, for fruit in *modern* orchards. *Butcher* v. *Hill*, *Ambl.* 176.] Seventeen pence for every cow having a calf, for the tithe of the milk and calf; eleven pence for the tithe of the milk of a milk cow, milked without a calf; for every heifer, the first year she has a calf, thirteen pence for the milk and calf; these payable at Michaelmas. — Eight pence for every hogshead of cyder, made of apples grown in the parish; for hoard apples, one penny; for firewood spent on the farm, one hearth-penny; for fruit, herbs, roots, and other garden-stuff, a garden-penny; for a colt, one penny: these payable at Easter. *Roe* v. *the Bishop of Exeter*, *Bunb.*57.— Eight pence for a cow, four pence for an heifer; three shillings and four pence, payable at Easter, for every score of sheep shorn out of the parish, and so proportionably for a less number than twenty, or for a less time than a year, for their wool and lambs. *Phillips* v. *Symes*, *Bunb.* 171. — Two pence an hogshead for cyder. *Roll.Ab.*649. — The non-resident occupiers of land in B. and W. to pay on Good Friday, or as soon after as demanded, four pence an acre for the tithe of hay, and the herbage of pasture lands not ploughed or sown; but, if resident, to pay tithes in kind. *Monson* v. *Chapman*, 2 *P. Wms.*565. — Four pence an acre for high land, and three pence an acre for low land. *Bate* v. *Howland*, cited *ib.* — Twelve pence for an acre of low meadow, and eight pence for an acre of high meadow, for tithe of hay. *Gardiner* v. *Pole*, 1 *Bro. P.C.*214. [7 *id.* 5.] — One penny for hay for an ancient messuage, with the demesne lands thereunto belonging, containing 60 acres, &c. — One pound six shillings and eight pence for an ancient tenement, containing 625 acres, for hay, small tithes, and Easter offerings. *Finch* v. *Maisters*, *Bunb* 161. — Nine cart-loads of log-wood, delivered to the rector by the lord of the manor, for himself and tenants, in lieu of all tithes. *Woolferston* v. *Mainwaring*, *Bunb.* 279. — So of six pounds *per annum*. *Pigot*

T. 1733. *Gibb* and *Goodman.* It was said by *Pengelly* chief baron, that in an answer to a bill for tithes, it is not absolutely

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v. *Hearne, Cro. Eliz.* 559. — A halfpenny for each calf in lieu of calves, payable on Wednesday before Easter. — A smoak penny for firewood, [burnt in the house]. — An halfpenny, payable on Shear-day, for the wool of each sheep dying between Candlemas and Shear-day. — Four pence a month, payable on Shear-day, for the tithe wool of every hundred sheep shorn in the parish, which were brought in after the 2d day of February. — Three eggs for every cock and hen, duck and drake; payable on Wednesday before Easter, in lieu of tithe eggs, and chickens and ducks hatched in the parish. *Brinklow* v. *Edmonds, Bunb.* 307. — Thirty eggs for all tithes of eggs. 1 *Roll's Abr.* 648. 651. 2 *Salk.* 656. — The tenth cheese made from the first of May until the last of August, in discharge of the tithe of milk. *Austin* v. *Lucas, Cro. Eliz.* 609. — An halfpenny for the wool of sheep sold after shearing, and before Michaelmas. *Moore*, 911. — One penny per head for sheep brought into the parish after Candlemas, and clipt in the parish, in lieu of tithe of wool; three pence per head for sheep in the parish before Candlemas, and carried out before shearing time, though the wool tithe is not then actually due. *Ellis* v. *Saul*, 1 *Anst.* 341. — It is a good modus for an innkeeper, that in consideration that he and all, &c. have paid tithe hay and grain growing upon the land belonging to the said inn, and have paid tithe for all their own cattle feeding upon the land, that they have been time, &c. discharged of the tithes of the horses of their guests agisted in the said land, when they travel by the said inn; for some have said, that this was but a personal tithe, and others have said that no tithes should be paid for such *agistment* by the common law, without any modus. [But see *Guilbert* v. *Eversley, Hard. R.* 35. *contra.*] A prohibition granted. *Gabel* v. *Richardson*, 9 *Vin. Ab.* 13. [A customary payment every year of six pence for every cow depastured within the parish, in lieu of tithe milk and calves; one penny for every fleece of wool, in lieu of tithe wool shorn from every sheep fed therein; two pence for every colt foaled; four pence for every garden, in lieu of garden stuff; four pence for potatoes tilled in a ridge in the field for family use, and not for sale; one penny for any small quantity of hemp sown every year by every occupier of lands within the parish; two pence for Easter offerings in every year for every inhabitant of sixteen years or upwards; one penny for every pig, and three half-pence for every goose, where they did not amount to a tithable number (*Boscawen* v. *Roberts*, 3 *Wood's Dec.* 174. *Gwm.* 946.); eight-pence a score, in lieu of tithe wool, for sheep wintered in other parishes, and brought in only a short time before shearing (but see 1 *Dan. R.* 35.); four pence for every acre of grass cut and made into hay, in lieu of the tithe of hay (*Thompson* v. *Holt, Gwm.* 671. *Gills* v. *Horrex, Gwm.* 861.); one penny for every foal; two pence for every milch cow; one penny for every heifer that hath had but one calf, in lieu of all milk and profits arising by such cow and heifer, except the calf (*Jenkinson* v. *Royston*, 1 *Dan. R.* 127.); one pound two shillings and eight pence for hay, small tithes, and Easter offerings, for an ancient tenement containing 625 acres (*Finch* v. *Maisters, Bunb.* 161.); and of

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necessary to express the day of payment of a modus insisted on, but this may be supplied by evidence, so as to be a foundation for the court to direct an issue at law to try the modus; but in a cross bill to establish a modus, a day must be expressly alleged, otherwise it will be fatal. *Bunb.* 328. (3)

And many moduses have been set aside, in regard that no day of payment was set forth by the defendant. As in the case of *Whitehall* and *Offley*, *T.* 5 *G.* Mr. Offley had sued Whitehall in the spiritual court for tithes. Whitehall moved for a prohibition, and suggested a modus, but set forth no day of payment. For want of which the court was of opinion it was naught [447]

E. 8 *G.* *Goddard*, rector of Castle Eaton in Wilts, v. *Kable.* The defendant insisted upon several moduses; viz. 3*d.* for a milk cow, 3*d.* for a lamb, 3*d.* for a colt, 1*d.* for a garden, and the like: but they were all set aside, in regard no time for the payment thereof was ascertained by the defendant. [*Bunb.* 105. (*m*)]

T. 8 *G.* *Woodford*, vicar of Ebeshame, alias Ensom in Surrey, against *Crosse.* Modus, 4*d.* a cow for milk and calf, 2*d.* for a dry beast, 3*d.* for a lamb, and so on; but no day of payment set forth by the defendant: Set aside for the same reason.

Penrice, vicar of Dodderhill in Worcestershire, versus *Dugard.* Modus, 4*l.* 10*s.* for all small tithes arising on an estate called Impney: Set aside, because no day of payment was set forth by the defendant in his answer.

Pemberton, vicar of Belchamp St. Paul's in Essex, against *Sparrow and others.* Several moduses set aside for the same reason. [*Bunb.* 105.]

T. 9 *G.* *Corpus Christi* v. *Vincent.* Modus, 1½*d.* for a young milk cow, and 2*d.* for an old milk cow: Set aside for the same reason.

And the reason these decrees go upon is, that tithes in kind being a provision made by law for the clergy, which becomes due at a certain determinate time, and which if not then set forth are

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eight pounds for a farm of eighty pounds *per annum*, in lieu of tithes (*Edge* v. *Oglander*, *Gwm.* 536.)—have all been adjudged certain, valid, and good: four pence for every cottage and garth held good; so one penny for every *strip* cow; four pence for every foal; two shillings and sixpence for every tenth lamb, in lieu of the tithe of such ten lambs: *dub.* *Graham* B. as to the two last. *Layng* v. *Yarborough*, 4 *Pri.* *R.* 383.; but *Selby* v. *Clarke*, 1 Ld. *Raym.* 699., is *acc.* to the last modus.

(3) S. P. held in *Bennett* v. *Treppass*, *H.* 1722, 4 *Bro.* *P.C.* (ed. *Tomlins*) 650.

(*m*) *Vide* also *Phillips* v. *Symes*, *Bunb.* 173., where a modus was set aside, because stated to be payable at *Easter or otherwise, when the sheep shall be sold.* But in *Woolferston* v. *Manwaring*, *Bunb.* 280., a modus of 2*d.* per acre, for 18 acres, was established *after verdict for defendant*, although no day of payment was set forth, nor by whom.

immediately demandable, shall not be taken from them by an uncertain payment which becomes due on no determinate day, and which they cannot know when to demand, or go about to receive, if it be withheld. Besides that such an uncertainty lays a foundation for many disputes, as in the case of the death of an
[448] incumbent, where tithes are paid in kind, all tithes severed before his death go to his executor, the rest to his successor; but if a modus to be paid on no certain day should be allowed, no one could determine in that case, whether it should go to the executor of the preceding incumbent, or to the successor.

But the courts of late have not been so strict, as to the limiting a precise day of payment. In the case of *Carte* and *Ball*, May 13, 1747; a bill was brought for a subtraction and account of tithes, against the inhabitants and occupiers of Hinckley in Leicestershire. The defendants insist upon a contributory modus of 17*s*. in the whole, paid for the hides, in lieu and satisfaction of all tithes: *viz*. 5*s*. 8*d*. for the part of hides in the occupation of such a person; 4*s*. 4*d*. for the part in the occupation of another; and 7*s*. for the part in the occupation of another. By the lord chancellor *Hardwicke:* Two objections have been taken by the plaintiff; that it doth not express the time when it is to be paid, nor enumerate the persons by whom it is to be paid. As to the first, in the court of exchequer, if a particular time was not laid, that court formerly would have over-ruled the modus, and not gone into the merits; but more lately they have very properly let in a greater latitude of proof, and it is sufficient if it is laid at a particular time, *or thereabouts*. But the second is what I lay stress upon, that it is not said by whom it is to be paid: and I do not know any case in the books, or in experience, where it is not alleged to be paid by somebody; and it is very reasonable it should be said by whom, because the parson may then be sure to whom he must apply, or against whom he may have a remedy for his tithes. This cannot be supplied by saying, that in other parts of the answer they have shewn the 17*s*. have been paid by those persons who have held these lands, for that may be accidental: and though it hath been said this court does not take customs so strictly certain as courts of law; yet this court requires customs to be substantially laid. If before the court of exchequer, where cases of this kind are more frequent, it would have been overruled at once. 3 *Atkyns*, 496. [1 *Ves. R*. 3.]

And in the case of *Richard* and *Evans*, Oct. 26, 1747; the plaintiff, as rector, brought a bill for payment of tithes in kind; the defendant, as owner of the farm, brought a cross bill for establishing a customary payment of 7*l*. a year, in lieu and satisfaction thereof. For the plaintiff it was insisted, that this modus is neither well laid nor proved, nor is the day of payment cer-
[449] tainly specified; for want of which a modus was held not good in point of law in the exchequer, *T*. 5 *G*., because the time of payment of a modus ought to be as certain of the tithes, in place of

which it is substituted; which, as to the fruits of the earth, is immediately on the first severance; and a custom uncertain is no custom. By the lord chancellor *Hardwicke*: As to the general question, whether it is necessary to lay and prove a particular day of payment, the case in the exchequer was certainly so determined; but I remember it gave general dissatisfaction in Westminster-hall and abroad, as too nice to require the proof of a particular day; and it hath been since adjudged to the contrary, that *on or about* is sufficient: so that they have left off taking that exception in the exchequer. 1 *Vezey*, 39.

And it seemeth now to be held, where an annual modus hath been paid, and no certain day for the payment thereof is limited; that the same shall be due and payable on the last day of the year. [But in 1810 (4) prohibition was denied to the spiritual court, for rejecting a modus set up there of 1*d*. for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkeys, at the option of the vicar; such *modus* not ascertaining any certain time when the money payment in lieu of the eggs was to be made, in case the option was made to take it in money; and lord *Ellenborough* said, That the chancellor himself, in *Richard* v. *Evans*, assumed that it was necessary that there should be some fixed time of payment, though in pleading it was not necessary to lay the precise day; and laying it *on or about* such a day was sufficient. But that without some fixed time it could not be known to which of two vicars, in case of a change, the money payment would belong.]

Must be ancient, [and *ergo*, not rank.]

9. A modus must be ancient: and therefore if it is any thing near the present value of the tithe, it will be supposed to be of late commencement, and for that reason will be set aside. [Whenever a modus runs high, says lord *Holt*, it is a strong presumption there is no modus. (5)] For all these moduses proceed upon a supposition of an original real composition having been actually made; which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the reign of Richard the first (6) [A.D. 1189]: and any custom may be

(4) *Roberts* v. *Williams, Clerk*, 12 *East, Rep*. 33.

(5) *Startup* v. *Dodderidge*, 11 *Mod*. 60.

(6) 2 *Inst*. 238, 239. This rule was adopted, when by the statute of *West*. 1. (3 *Edw*. 1. *c*. 39.) the reign of Rich. I. was made the time of limitation in a writ of right. But this period in a writ of right hath been since reduced by the statute of 32 *Hen*. 8. *c*. 2., to sixty years. It seems somewhat unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. [See *Litt*. § 170. 34 *H*. 6. 37. 2 *Roll*. *Ab*. 269. *pl*. 16., cited 2 *Bla*. *C*. 30. note (*u*).] But no inconvenience re-

destroyed by evidence of its non-existence in any part of the long period from his days to the present. Wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this modus is *felo de se*, and destroys itself. For as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original. *Blac. Com b.2. c.3.* In the case of *Layfield*, rector of Chiddingfold in Surrey, and *Delop*, *H.* 1697, the defendant insisted on a modus of 3*d.* for each lamb. The court held, that was too much, and could not be; for that a lamb was not then worth 2*s.* 6*d.* in that county.

So in *Benson* and *Watkins*, *H.* 3 *G.* The following moduses; *viz.* 5*s.* an acre for the tithe of winter corn, 4*s.* an acre for summer corn, 2*s.* 6*d.* an acre for upland meadow, and 3*s.* an acre for lowland, were set aside as too big.

[450] *Lloyd* and *Small*, 4 *G.* The defendants insisted on several moduses for all small tithes arising out of their respective farms. But it appearing by their answer, that their small tithes in kind, in the year demanded by the bill, did not amount to more in that year than the pretended moduses, the moduses were set aside.

T. 7 *G. Franklin* and *Jenkyns.* The bill was brought by the parishioners of Farnham in Hampshire, against the vicar and tenant of the impropriator there under the hospital of St. Cross, to establish several moduses; some of which were set aside as too big; and among the rest, a pretended modus of 6*d.* for the tithe of a calf.

[A customary payment of 2*s.* payable by the occupiers of inclosed arable lands in lieu of the tithes of every acre thereof, when sown with corn and grain; 1*s.* 6*d.* an acre for tithes of grain reaped on common arable fields (7); 4*s.* an acre for every acre of wheat, and 2*s.* for ever acre of lent corn reaped (8); 1*s.* for every tenth fleece, pig and goose, in lieu of the tithe of the ten fleeces, &c. (9); 1*s.* 6*d.* and 2*s.* an acre for tithe hay (1);—was held rank, and have been dismissed by the court at once, as being *primâ facie* rank, and therefore void moduses: The

sults from the rule as [applied to *moduses*]: for it is not necessary to produce evidence that a custom has existed during all this space of time; but a proof of its existence for a comparatively short space of time is evidence of immemorial usage, if nothing appear to the contrary.

(7) *Gale* v. *Carpenter*, *Gwm.* 945. 3 *Wood's Dec.* 173.

(8) *Hulse* v. *Monk*, *Gwm.* 960.

(9) *Layng* v. *Yarborough*, 4 *Pri.R.* 383.; and see *Torriano* v. *Legge*, *Rayner*, 521.

(1) *Heaton* v. *Cooke*, *Wightw. R.* 281.

modus in *Layng* v. *Yarborough*, was also bad, as not providing for the intermediate numbers. (2) So 1*s.* for each milch cow (supposed to be above half the value of the milk at the time the modus probably commenced); 6*d.* for every calf killed and sold (3); 1*s.* for every lamb (4); 4*s.* for every ten lambs fattened; 4*d.* each for all under five, and for all above five and under ten, 4*d.* each on the shearing day, and 3*d.* each for all other lambs bred in the parish, in lieu of the tithes of such lambs (5); 3*d.* for every lamb (6); 4*l.* 10*s.* *per annum* for a farm of the yearly value of 30*l.* (7); 2*s.* in the pound on the improved yearly rent (8); — have been dismissed in like manner.

On the other hand, 1*s.* per acre for low meadows, and 8*d.* an acre for high meadows, have been held good moduses (9); though it was afterwards said, that had the moduses been for tithe hay only, or the tithe arising on the land, 1*s.* would have been too rank. (1)]

And the reason these decrees go upon is this: That the value of money being much greater at the time when all moduses are presumed to have begun than it is now, a modus near the value of the tithes at this day must have been at that time a great deal more; and it is not to be supposed, that the parishioners would at any time give so much more than the value of their tithes. [But a modus of 1*s.* for each day's math has been adjudged good, the C. B. observing, that in considering such a sort of *modus* it was not fair to look at the mere value, and from comparative reasoning to determine the validity of the custom; as agreements of this kind are not similar to other human transactions in matters of contract, and it is very probable that motives besides those of interest operated on the mind of one of the contracting parties, and determined him to make a very beneficial bargain to the parson. (2)

A distinction prevails between a modus the validity of which depends on the value of *things* before time of memory, and one which regards the value of *land* at that period. The inference

(2) See 4 *Pri.* 407. 397.

(3) *Franklyn* v. *The Master, &c. of St. Cross*, *Bunb. R.* 78. *Leathes* v. *Newitt and others*, 4 *Pri. R.* 369.

(4) *Drake* v. *Smith*, 1 *Dan. R.* 115. 5 *Pri. R.* 369.

(5) *Wood* v. *Harrison*, 3 *Wood's D.* 250. *Gwm.* 970.

(6) *Bishop* v. *Chichester*, 4 *Gwm.* 1316. But see *Webb* v. *Giffard*, *Gwm.* 708.; and *Drake* v. *Smith*, *Bertie* v. *Beaumont*, 2 *Pri. R.* 303. Judgment of *Richards* C.B. *in Layng* v. *Yarborough*, 4 *Pri. R.* 414.

(7) *Kennedy* v. *Goodwin*, *Bunb.* 301. 2 *Wood's Dec.* 305.

(8) *Startup* v. *Doddcridge*, *Salk.* 657.

(9) *Pole* v. *Gardiner*, 1 *Bro. P.C.* 214. *Gwm.* 601.

(1) *Bate* v. *Hodges*, *Bunb.* 125. See as to *lambs*, *Askew* v. *Greenhill*, 2 *Pri. R.* 314. *n.*

(2) *Markham* v. *Huxley*, *Gwm.* 1499.

from the magnitude of the payment in the former case is much stronger against the fact that it is immemorial than in any agreement to pay so much an acre, and *à fortiori* for a particular farm; for it is perfectly easy in almost any period of our history to ascertain what a lamb was worth, and therefore to conjecture upon what composition the parties in any place would agree: but what was the value of land in a particular parish at a particular period, and what therefore it is proper to give per acre, is a very complicated question. (3)]

In *Chapman* v. *Smith*, July 17, 1754, the bill was brought by the rector of the parish of Altringham in Kent, for payment of tithes in kind for the lands therein. The defence set up in the answer was a modus in this parish time out of mind, *that all occupiers in the marsh lands in this parish have always paid, or ought to pay, yearly to the rectory 9d. an acre, and no more, for every acre of marsh land within the said parish*, and the tithable places thereof in their respective possessions, except when sown with corn, grain, flax, or planted with hops, as a modus in lieu of all tithe of hay and pasture, and all small tithes except flax, hemp, and hops: *and so after that rate for a greater or less quantity than an acre of marsh land.* For the plaintiff it was rested on the rector's title. For the defendant it was argued, that this was a good modus and well laid: and a case in the exchequer in 1726 was cited, where a bill was brought by Richard Bate as rector of the parish of Warehorn, the very next to this parish, for tithes in kind; and a cross bill by sir Charles Sedley and others, inhabitants of that parish, to establish a modus of one shilling for every acre of marsh land, laying exactly as the present modus: Two issues were directed; and upon the equity reserved after the trial, the modus was established. This is a precedent both in law and equity, shewing this as a modus well laid, and that in a court where these kinds of bills are particularly attended to; and answers the objection of being too rank,
[451] this being laid only at 9*d.* an acre. In *Evans* v. *Price*, 26th Oct. 1747, it was held, that the rankness of a modus is not to be judged by comparison of the sum to the rent reserved on the land, but to the value of the land; and that where it was necessary in point of proof, the court would direct that matter to be tried, but otherwise the court itself would judge of it. These lands lie in Romney marsh; to preserve which the owners are at a very great expence, and therefore it is probable that they made this composition, and then the variation of the land is not a reason to say, this is a rank modus; for the value of lands depends on particular husbandry, and is uncertain. It is im-

(3) *Mirehouse on Tithes*, 186. *O'Connor* v. *Cooke*, 6 *Ves. R.* 672. *Heaton* v. *Cooke*, *Wightw. R.* 304. 306.; and see *Chapman* v. *Smith* and *Ekin* v. *Pigot*, in text.

possible to say, what the value of the lands was at the time of this composition, and reasonable to think a proper valuation was then made.—For the plaintiff it was answered, Where a modus appears so large, that it is imposible it could be time out of mind, the court will always destroy such a modus upon the face of it. Every modus presumes an original agreement before the disabling statutes, by parson, patron, and ordinary. The commencement then must be presumed consistent with right reason; and the court will not presume that the parishioners (in whose favour all these contracts are) made such a composition as was of more value than the tithes. The payments must be always in money: this being pasture tithe, which is always pecuniary, cannot be specific, and the only tithe in the kingdom which is not specific. It is not to be conceived, that 9*d.* would be paid, if the real tithe did not amount to half that. The value of an acre, to support this as a reasonable composition, at the time must have been 7*s.* 6*d.* So high a modus creates a strong presumption, that it was not made beyond time of memory. The law fixes that to a certain period in the time of King Richard the first, since whose death it is above 560 years. This then must be presumed an agreement before that time to pay 9*d.* an acre. In fact, in the time of king Hen. 8. these lands were valued at 2*s.* an acre: as appears from several records, particularly from a survey then taken, now produced out of the augmentation office. The other objection, and which destroys the modus on the face of it, is from the exception of tithe of hops; which shews it a composition coming in queen Elizabeth's time; though perhaps they existed here a little before, there being a statute in the time of Hen. 8. prohibiting them as a venomous weed. It could not then be an agreement before time of memory. The exception must be taken entire with the modus; for the court never [452] severs a modus, or considers one part as good, and another as bad. Hops being alleged as part of the description, it is thereby as much *felo de se* as if laid particularly and precisely for hops, which is never allowed. — By the lord chancellor *Hardwicke*: This case is of very great consequence, the marsh extending through a vast tract of country. The court certainly ought to support the rights of the church, and not to allow any modus or customary payment that by the rules of law is not to be supported. At the same time the court ought not lightly to overturn customary payments, that have prevailed for a great tract of years, which is commonly called time out of mind, or the memory of man; though I do not mean strictly according to the notion of law, before the time of king Richard the first. There are two objections against this modus: one is, that this payment of 9*d.* an acre cannot have subsisted time out of mind, because 9*d.* an acre must be much above the value of the tithe at the time this

modus must be supposed to commence; which the law of England, by a pretty extraordinary stretch (and which, I believe, no other country does), makes from the transportation of king Richard the first to the Holy Land. The other is, that this modus cannot have subsisted time out of mind, because there is an exception of a product and culture, which was not and could not be in use at the time when it was supposed to commence. And this objection hath in it something very material; for hops are always allowed to have been introduced in modern times, that is, modern in respect of long antiquity. They began to be used and propagated in queen Elizabeth's time, and existed in this kingdom some time before: they were here, as tobacco is here, planted for curiosity and in small quantities. It is not possible there could be such an exception at the commencement of the modus; but the question is, whether the making this exception overturns the affirmative part of the modus. And I am of opinion it doth not. Suppose the agreement was to pay 9*d.* an acre for all small tithes of this land, except such small tithes as shall be afterwards introduced, that would be certainly a good agreement. Then, instead of laying it in those general words, they have specified it with such a sort of product, as these lands probably will be tilled with. And it is too much to lay such weight on this objection, as to overturn the modus on that account. The more material objection is, whether the modus is
[453] not too rank. It is insisted upon as too high in point of value, and therefore that the court is bound to take notice of it, and ought to over-rule it. That doctrine hath undoubtedly prevailed in several cases; but most commonly as to the value of particular things for which the modus hath been set up, as where it is so much for a sheep or lamb, or a particular kind of product, the value of which may be shewn at these times: but it may differ as to a modus set up as to the value of lands, because several incidents and accidents may attend that; the alteration of traffic or commerce, or of the culture of land, either improved or falling in value by accident, makes such a modus more uncertain than in respect of the value of a particular kind of product, as calves, sheep, lambs, and things of that kind. (4) Therefore, though this objection is taken in point of law for the judgment of the court, yet the court doth not always proceed as bound to determine in that way, but hath considered it as a matter of fact proper for a jury. And this being a case of so much consequence, I shall send it to a trial at law.—And he directed an issue accordingly. 2 *Vezey*, 506. [And in *Mitchell* v. *Neale* (5) it is said, that the former practice in the court of

(4) And see *O'Connor* v. *Cooke*, 6 *Ves. R.* 672.
(5) 2 *Ves.* 680. *M.* 1755.

exchequer, of directing an issue to try a modus in the first instance, is now altered; but not in every case.]

In *Ekin* v. *Pigot*, March, 3, 1745, a bill was brought for tithes in kind of the manor of Dodeshall in the parish of Quainton. The defendant insists upon a modus of 48*l.* in lieu of all tithes of that manor. For the plaintiff it was insisted, that it was too rank; for the whole rectory was worth but 33*l.* a year in Henry the eighth's time; and the whole demesne lands of that manor, in queen Elizabeth's time, were worth but 48*l.* a year: so that the modus then would have been just as much as the manor itself. And the plaintiff proved, as exhibits, the value of the first fruits from a return made by the augmentation office; and for the value of the manor, an inquisition *post mortem.* By the lord chancellor *Hardwicke:* There is no person more unwilling than I am to set aside such payments in lieu of tithes; but there must be some ground of law upon which to support such payment. The objection is, its being too rank a modus, and consequently that it could not be time out of mind; for it appears that manor is now but 80*l.* a year; and according to the natural improvement of lands from Henry the eighth's time, it ought to have been ten times as much, on account of money sinking in its value, and lands rising in theirs. The returns from the first fruits office, and the inquisition *post mortem*, though they are not conclusive evidence, yet are sufficient upon the circumstances of this case; because the defendant has not produced any evidence [454] to contradict it. Taking all the evidence together, this appears to be nothing more than a composition upon agreement, which parsons have *submitted to in succession* (6) from time to time, and is merely a personal payment; not a composition *real*, which is some charge given to a parson upon lands, under a deed to which himself and the patron and ordinary are parties, and of a different nature from this. 3 *Atk.* 298.

[Rankness is only evidence against the immemoriality or [454 *a*] antiquity of the payment, and forms no objection in point of law to the modus, if it can be inferred to have existed. So the mere *quantum* of the sum is not to be taken as decisive evidence of the rankness of a *modus;* but it must also be considered whether it has been immemorially paid, notwithstanding its magnitude. (7) The wording of the question sent by Ch. Bathurst, for the opinion of C. P. in *Pike* v. *Dowling* (8), was thus, "Whether a "*modus* of 2*s.* 6*d.* for every tenth lamb, to be paid on 5th April "in each year, is a good *modus*, or not?" The court certified,

[Effect of rankness, when given in evidence.]

(6) See p. 442.
(7) See *Wightw. R.* 289.
(8) 2 *Bla. R.* 1257. *Gwm.* 1169. See *Twells* v. *Welby*, *Wightw. R.* 303. *Gwm.* 1192.

that as the case admitted the existence of the modus in question from time immemorial, which they conceived to be a question of fact (9), they were of opinion that there did not appear any reason why this should be considered as a void modus in point of law, as for uncertainty, inequality, &c. The question of rankness was therefore precluded (1), because the question asked furnished its own answer unavoidably. (2) It however seems now generally allowed, that as the modus is a question of fact and not of law (3); so rankness is only matter of evidence relating to such modus (4), and as such a question of fact only. (5)

[Power of courts of equity to decide on rankness without a jury.]

Upon the power of courts of equity to decide on this *fact* of rankness without the intervention of a jury, difference of opinion has existed among the judges of these courts. The decisions have upheld the principle, that as the law now stands, "a court of equity shall decide on facts as well as "on law, if they have sufficient evidence of the fact to satisfy "their minds." It is nothing to say (proceeds C. B. *Richards*) that the question of *modus* is a question of *fact*; because if it is such, we are alike bound to decide it, if the evidence is sufficient to enable us to do so. It is like every other fact, and what is called rankness is only matter of evidence. (6) Again, lord *Eldon* desired it to be understood, that after then about forty years' experience in the profession, he took it to be quite clear, that a court of equity in cases of this sort, as well as with respect to all cases where matters of *fact* are in question, has a *right* itself to determine on the fact without the intervention of a jury. "If "the evidence which is before a court of equity is satisfactory on "the fact, I never can admit that that court is bound to send "any such case to a jury." (7) Again, C. B. *Richards* has since said, it is of the essence and constitution of equity to decide at once on facts, except in one or two instances; as that of an heir at law disputing the validity of a will, and a rector suing for

(9) *O'Connor* v. *Cooke*, 8 *Ves.R.*539.; and see per *Wood* B., *Wightw. R.* 289.

(1) *Id.* 316.

(2) *Id.* 323.

(3) Per *Wood* B. *Wightw. R.* 288. 4 *Pri. R.*392. 415.

(4) 4 *Pri.R.*415., per *Richards* C.B.; and see *supra*, 449., and note.

(5) Per Lord *Eldon*, in *O'Connor* v. *Cooke*, 8 *Ves.* 539.

(6) 4 *Pri. R.*415.; see also 2 *Bla. R.*1259. *per De Grey*.

(7) *Bullen* v. *Michell*, 2 *Pri. R.*466. 469. (1816.) In this case it was in effect decided that the *satisfaction* of the *majority* of the judges of the exchequer is the satisfaction of the *court*. See *Minor Canons of St. Paul's* v. *Morris*, 2 *Pri. R.* 418.; *id.* 467. cited by Lord *Eldon*; and 2 *Pri. R.* 25.

tithes. (1) As the law now stands, a court of equity should decide on facts as well as on law, if they have sufficient evidence of the facts to satisfy their minds. (2)

Before these final assertions of the power of equity on this point there were cases which it was said it would be perfectly useless and nugatory to send to a jury, and so notoriously rank from their internal evidence, that a court of equity would not direct an issue on them, but would overrule the claim without sending them to a trial at law. (See 2 *Bro.* C. C. 163, &c.) Thus in *Heaton* v. *Cooke* (3) three barons agreed in deciding that moduses of 1*s.* 6*d.* and 2*s.* per acre for tithe hay were rank: arguing that it was the province of the court to determine originally on matters of fact of this kind, and to give the party the benefit of that opinion without sending him to a jury. On the other hand, B. *Wood*, differing *in toto*, said that rankness was merely a species of evidence to negative the probability of a modus, and as such ought to be submitted to a jury, in his opinion the proper and only constitutional tribunal for trial of a prescriptive modus. It was also to be remarked, that in all appeals from the exchequer to the house of lords when the court had refused to grant an issue on moduses, that house had uniformly reversed the decree of the court, and granted the issue. (4) *Chapman* v. *Smith*, *supra*, decided by lord Hardwicke, is to the same point; the validity of a modus of 3*d.* for every lamb, payable on St. Mark's day, or as soon after as demanded, was sent to be considered by a jury, and the decree was affirmed by the house of lords. (5)

This discretionary power in courts of equity of deciding on moduses or sending them to be tried by a jury, has, however,

(1) *Mytton* v. *Harris*, 3 *Pri. R.* 25., *Bullen* v. *Michell*, 2 *Pri. R.* 423. 399. And see 18 *Ves.* 175. For if a *rector* who has a *primâ facie* title to the tithes of a parish *sues*, (and is not improperly joined,) it is an established rule, that if a modus is set up against his claim, he has a right to have the question tried on an issue before a jury at law. *Williams* v. *Price and others*, 4 *Pri. R.* 156. But *vicars* are by no means entitled to issues as a matter of course. *Per Richards* C. B. in *Petch* v. *Dalton*, 6 *Pri. R.* 239. In questions between *rectors* and vicars, the former cannot claim an issue as a right, but it is granted or not, according to the instrument of endowment, or the proof of perception adduced by the vicar as founding presumption of anterior endowment. See *Dorman and others* v. *Curry and others*, 4 *Pri. R.* 114. *Parsons* v. *Bellamy and others. Id.* 200. *Petch* v. *Dalton*, 6 *Pri. R.* 238. Perception and long enjoyment is the vicar's common-law proof. *Per Graham* B. in 2 *Pri. R.* 450.

(2) *Layng* v. *Yarborough*, 4 *Pri. R.* 415.

(3) *Wightw. R.* 281.

(4) *Wightw. R.* 289. See *e.g. Ekins* v. *Dormer*, 3 *Atk.* 534.

(5) *Webb* v. *Giffard*, 4 *Bro. P. C.* 212. *Gwm.* 708.

been exercised with great moderation by lord Eldon. "With "regard to the cases," says he, "I never could persuade myself "that 1*s*. per acre for all tithes was not in all probability a "monstrous payment, and that the payments sent to be tried at "law were not monstrous: but still the judges have thought even "such payments ought to go to trial, and verdicts, under which in "many cases even more has been claimed, have been confirmed. "I am not at liberty, therefore, after what has passed in former "cases, whatever may be my persuasion as to the truth of this "case, to say this must not be tried. In *Fermor* v. *Loraine*, I never "had the least doubt that the modus was too rank, but the court "sent it to an issue." (6) On a motion for a new trial, he added, "I cannot hold the language that has been held as to sending "this to the prejudices of a jury. A jury is the constitutional "tribunal of the country, and I am not at liberty to suppose they "will be guided by prejudice. It is extremely well understood "now, that the question, whether rank or not, is a question of "fact (7); and the best way in cases of this description is to "leave them to a jury, who, from reference to the state of culti-"vation or of luxury at the time, may have the best opportuni-"ties of ascertaining the fact." (8)

Farm modus to be sent to a jury.

A distinction between sending a farm modus and a modus for a specific produce to a jury was introduced by lord Hardwicke (9), and assented to by Macdonald C. B., who said that in a farm modus the court should be extremely cautious in deciding a question without the intervention of a jury, particularly where a doubt arises as to the fact of rankness, as the owner may have meant a bounty to the clergyman, or to pay for an exemption from tithes for the sake of improvement; nor should it be nice in judging of the value or goodness of the bargain, where by any probable circumstances which policy or propriety may have dictated, there may have been a real agreement between the parties before the time of memory. (1) Other motives than those of pecuniary bargain might have influenced a particular proprietor to make a grant to the church; and the validity of a farm modus therefore is not to be tried by a comparison of value with the whole tithe at any remote period. (2) Hence B. Wood states, that for the forty or fifty last years he cannot find that either

(6) *O'Connor* v. *Cooke*, 6 *Ves*. 672.
(7) *Ib*. 8 *Ves*. 539.
(8) *Per Richards* C. B. *Drake* v. *Smith*, 1 *Dan. R*. 115. So in *Williamson* v. *Lord Lonsdale*, 5 *Pri. R*. 25. *Dan. R*. 49., that C. B. asserted the impartiality of juries in tithe cases.
(9) *Chapman* v. *Smith*, 2 *Ves*. 506. *Richards* v. *Evans*, 1 *Ves*. 36. *Edge* v. *Oglander*, *Bunb*. 301. *Bishop* v. *Arundel*, 1 *Rayner*, 98.
(1) *Atkins* v. *Ld. Willoughby de Broke*, 2 *Anst*. 397.
(2) *White* v. *Lisle*, 4 *Madd*. 224.

courts of chancery or exchequer have taken on themselves to determine a farm modus to be bad on the face of it on account of its largeness, but have thought it right to send it to a jury. (3)]

10. A modus must be something durable; because the tithe in kind is an inheritance certain, and it is against nature that it should be extinguished by a recompence not as durable at least, though not so valuable; for this reason, four pence to be paid yearly, by two persons inhabiting two such houses, in consideration of all tithes, hath been adjudged ill; because the houses may decay, or none live in them. *Gibs.* 675. (*n*) [455]

Must be durable, [*i. e.* must be certain with reference to *duration.* (See *ante*, 8., for certainty as to *description.*)]

(3) *Heaton* v. *Cooke*, *Wightw. R.* 281. As to proof of farm modus by terriers, see Terrier, and for method of proving local situation, see *Wright* v. *Southwood*, 5 *Pri. R.* 608.

(*n*) *Gresham's* case, *Cro. Eliz.* 139. So also a modus for tithe to be paid by *the inhabitants of such a tenement, and the lands usually enjoyed therewith*, was declared void by Sir *Joseph Jekyl* M. R.; for the tenement may fall down, and be uninhabited, and the lands may be shifted, and let with other farms. [So, where all the occupiers of farm houses on the north side of a lane, with the land usually occupied therewith, had time out of mind paid 3*d.* at Michaelmas in each year for each cow; and all occupiers of farm houses on the south side of the lane, with the lands usually occupied therewith, had time out of mind paid 2*d.* yearly for each cow, in lieu of tithe of milk; the modus was held bad, and an account directed. *Carleton* v. *Brightwell*, *Gwm.* 676. 2 *P. Wms.* 462. *Perry* v. *Soam*, *Cro. El.* 139.] And a modus, that the *occupier of every farm house* within a township should pay a *tilt penny*, in lieu of the tithe of hay of lands occupied with such farm house, was holden to be void by the court of exchequer, because it shifted according to the occupation of the lands, and was liable to be reduced to a single penny, if not to be totally annihilated. *Travis* v. *Whitehead*, & *al.* 2 *Rayner*, 762. *Travis* v. *Oxton*, 1 *Anst. R.* 308. But a modus of 2*d.* payable *by every inhabitant householder of a parish* for the tithe of fruit, fuel agistment, &c. was decided in the court of exchequer to be good, because though the number of houses may diminish, it may also increase. And the *inhabitants householders* of a town or vill being perpetual in contemplation of law, the recompence to the vicar is certain and durable to a common and reasonable intent. *Bennett* v. *Read*, 1 *Anstr. R.* 322. See also *Hardcastle* v. *Smithson and Slater*, 3 *Atk.* 245. [This last decision has been confirmed in a late case; *Leyson* v. *Parsons*, 18 *Ves. jun.* 174. There an annual *payment of* 1*d. by each occupier of lands in the parish* for tithe of hay, was held a good *modus;* the *Master of the Rolls* saying, "On comparing the manner in which it is laid with that in *Bennett* v. *Read*, there is no distinction between them. In each case a custom is alleged in the parish for every occupier to pay a particular sum in lieu of all tithe; the quantity is therefore immaterial. If that case *is* to be distinguished from *Travis* v. *Oxton*, so is this in the same manner. If those cases *are not* to be distinguished, *Bennet* v. *Read* being the more recent case, I ought to follow it, and on that authority to hold this a good modus: but the vicar is entitled to an

Must be without interruption.

[456]

11. Custom or prescription must be constant, without interruption; and perpetual, from the time whereof the memory of man is not to the contrary: for if there have been frequent interruptions, there can be no custom or prescription obtained. But after a custom or prescription is once duly obtained, a disturbance for ten or twenty years shall not destroy it. 4 *Deg. p.* 2. *c.* 13. (4)

Modus how destroyed.

12. As every consideration will not make a good modus; so a modus, though founded upon good consideration, may be several ways discharged, and tithes become due in kind: As,

(1) Where land is converted to other uses: so when the prescription is for hay and grass, specially, in so many acres of land; if the land is converted into a hop garden or tillage, the prescription is gone. (*o*)

(2) By the [removal,] alteration, or destruction of the thing for which the money was paid: as, where two fulling mills were under the same roof, and turned into a corn mill; where also there was one pair of stones in a mill, and another pair was added (5): and where the watercourse was altered by the owner, and the mill was pulled down and re-edified upon it (6); in all these cases, it was adjudged that the modus was gone. [So where the owner of a mill, of his own accord, without cause or necessity removes his mill to a new place. (7) If there is a modus to pay a buck or doe, or shoulder of a deer, for all manner of tithes in a park (8); or 10*s.* for the deer and herbage of a park, and not for all the park; in all cases where the park is disparked, the prescription is gone, and if the land is cultivated with corn, tithes in kind must be paid. (9) In most cases, indeed, where the

issue, if he chooses. The distinction seems to be this: a payment *by the inhabitants of certain houses* is a bad modus, because houses may decay and not be rebuilt, or they may be uninhabited, and the modus depending on their existence, may be objected to for want of reasonable certainty in *duration*; but as it is not to be contemplated that a town or village will ever be wholly without inhabitants, a modus *to be paid by the inhabitant householders within a town or village* is sufficiently durable, and may on that account be good." *Bennett* v. *Read*, 1 *Anstr. R.* 329.]

(4) 2 *Inst.* 653, 654. 1 *P. Wms.* 663. *Nowell* v. *Hicks*, *Gwm.* 1570. *Wats. C.L.* 512.

(*o*) *i. e.* [suspended] till the former culture is restored, [and then the modus revives: or if the modus is for *the land*, an alteration in the mode of using it does not affect the modus. *Hob.* 39.]

(5) *Talbot* v. *May*, 3 *Atk. R.* 18. 1 *Brownl.* 32. *Grymly* v. *Falkinhan*, 4 *Mod.* 45.

(6) 1 *Rol.* 652. *l.* 17.

(7) 1 *Roll. Abr.* 652.

(8) *Bedingfield* v. *Fenk*, *Cro. Eliz.* 467. *Wats. Cl. L.* 513. *Hob.* 39.

(9) *Degge*, *c.* 16. 313.

origin of a park is discoverable, the modus is defective, as the king's licence to impark is seldom so ancient as the reign of Richard I.] But where a man was seised of eight acres of meadow and one of pasture, for the tithes whereof he had paid time out of mind 5s. 4d., and afterwards the owner built a corn mill upon the same; it was adjudged that he should pay no tithes for the corn mill, because the land was discharged by the modus. *2 Inst.* 490. [So if there are several water mills for which a modus of 4s. *per ann.* is paid, the destruction of one does not affect the modus, which is still payable (1); or if there is a prescription time out of mind, and the prescriber lets the land to farm, and the farmer pays tithes in kind, this does not destroy the prescription as to the lessor. (2)]

(3) By non-payment of the consideration, or by payment of the tithes in kind, for so long a time as to destroy the possibility of making proof that such custom or prescription was (*p*): but an interruption for some short time only, will not discharge it; especially if made by the lessee, to the prejudice of the lessor. *Wats. c.* 47. *Gibs.* 675. [And see note (4) in last page. Unity of possession, *viz.* to have the fee simple in the rectory, and in the land, will not destroy a *modus decimandi*. (3)]

Modus, how to be tried.

13. The rule is, that the modus is to be sued for in the ecclesiastical court, as well as the very tithe; and if it be *allowed between the parties*, they shall proceed there (4); but if the custom be denied, it must be tried at the common law: and if it be found for the custom, then a consultation must go; otherwise the prohibition standeth. The like is affirmed, in case a jury upon an issue joined in a prohibition upon a *modus decimandi*, find a different modus; since a modus is found, they shall not [457] have consultation. *2 Inst.* 490.

The principal reasons why the courts of common law prohibit the spiritual court from trying moduses, are, that whereas every modus is less than the real value, the rule of the canon law is, that less than the real value shall not be taken, and that a custom to the contrary is void; and that the ecclesiastical and temporal laws differ in the times of limitation, forty years or under making a good custom by the ecclesiastical laws, whereas

(1) *Talbot* v. *May*, 3 *Atk.* 17. *Degge*, c. 17. 316.
(2) *Monke* v. *Butler*, 2 *Roll. R.* 176.
(*p*) [For custom and prescription may be lost as well as obtained by time.] In this case, it doth not appear, in point of law, that the modus ever existed. [*Com. Dig.* tit. *Prescription* (G.), tit. *Dismes* (E 20.) *Wats. C. L.* 512.]
(3) *Chambers* v. *Hanbury*, *Moor. R.* 527. 1 *Roll. Ab.* 936. See *ante*, 424., and *note* (*s*) there.
(4) *Full* v. *Hutchins*, *Cowp.* 422. *Dutens* v. *Robson*, 1 *H. Bla.* 100. *Stainbank* v. *Bradshaw*, 10 *East.* 349. S. P.

by the temporal laws it must be beyond the time of memory. *Gibs.* 691.

But the spiritual courts have commonly allowed and do allow pleas of *modus decimandi*; and the averment in the prohibition is not, that they do take cognizance, but that the plea hath been offered and refused; which supposeth, that if the plea be admitted, the prohibition ought not to go. (5) And accordingly it hath been affirmed by *Doderidge* and others, that the spiritual court may as well try the modus, as the right of tithes; and that a prohibition is not to be granted, till the spiritual court either refuse to admit the plea, or proceed to try it by methods different from the rules of the temporal law, as to the time of limitation, or number of witnesses, or the like. (6) And where lord *Coke* contended for the contrary doctrine, it was declared by *Kelynge* and *Twisden*, in the case of the *Bishop of Lincoln* against *Smith* (7), that in case one libel for a *modus decimandi*, if the spiritual court allow the plea, they may try it. *Gibs.* 691.

But, notwithstanding, it seemeth now to be clearly settled, that if a *modus decimandi* be sued for in the ecclesiastical court, a prohibition lies to stop the trial of it, if the modus be denied (*q*); and the reason is not upon the account that the spiritual court wants jurisdiction, but in regard of the notion the temporal law hath of custom different from the spiritual: And seeing that every modus is due by custom, it is the common law only that can determine, what time and usage with us shall be sufficient to create such custom, that is, time beyond all memory to the contrary. Whereas by the spiritual law, sometimes ten years, sometimes
[158] twenty, they will adjudge sufficient to create a custom. And prohibitions in such cases are granted, not because the spiritual court hath not jurisdiction of the matter, but in respect of the trial which is to be by the temporal law only: and if upon the trial it be found for the modus, the proceedings shall go on in the spiritual court; if against the modus, the prohibition shall stand. *Wats.* c. 56. [The suggestion for a prohibition to the spiritual court in a suit for small tithes, if in the affirmative, must be proved within six months, according to 2 & 3 *Ed.* 6. *c.* 13., which are *calendar* months. (8)]

(5) Yet there are several exceptions, as in cases of *personal* and *small* tithes, in which customary payments are allowed without breach of conscience. *Gibs.* 691.

(6) *Price* v. *Mascoll*, 3 *Bulst. R.* 241.

(7) 1 *Ventr. R.* 3.

(*q*) It is not sufficient that the modus be denied, except the spiritual court be proceeding to try it; for it may be immaterial to the question. [*Dutens* v. *Robson*,] 1 *H. Bla. R.* 100. [So *comm. semb.*, If no proceeding is had since the plea of modus. *Graham* v. *Potts*, 1 *Bla. R.* 295.]

(8) *Foy* v. *Lister*, 2 *Raym* 1171. 2 *Salk.* 551.

M. 49 *G.* 3. *French* v. *Trask*. In this case the plaintiff libelled the defendant in the ecclesiastical court for tithe in kind. A prohibition was moved for upon an affidavit, that the defendant had "*answered on oath, or pleaded* to the said libel in the said court," a modus in lieu of tithes, which he had duly tendered to the rector, who refused to accept it. It was objected, that the defendant had only put in an answer of a modus in the court below, but had not regularly pleaded it, and therefore the application came too soon. Court said, that [this *being before* sentence] there must be a prohibition in this case, for it appears that there is nothing to try in the court below but the modus insisted upon in the defendant's answer. 10 *East's Rep.* 348.

But if in the trial of a modus, the defendant permits the spiritual court to proceed *to sentence*, he is then too late to come for a prohibition; because it is only for defect of trial, and not for defect of jurisdiction: but a man is never too late for a prohibition, where it is for defect of jurisdiction. *Bunb.* 17. (*r*) *Stainbank* v. *Bradshaw*, 10 *East's Rep.* 349.

Rotheram v. *Fanshaw*, March 25, 1718: On a suit instituted in the ecclesiastical court for subtraction of tithes, the defendant there, without pleading any discharge, brings a bill to establish a modus. The answer to the bill does not admit it. And he now moved for an injunction to stay the proceedings in the ecclesiastical court, upon the bare suggestion of a modus by his bill. By the lord chancellor *Hardwicke*: If I should grant this injunction, I should make a precedent for tripping up the heels of two courts; the ecclesiastical court and court of common law. The ecclesiastical court have a right to retain suits for tithes, whether at the instance of a spiritual person, or lay impropriator. There may be a suit also in that court for a modus, as well as for tithes in kind. The defendant likewise may plead a modus there: if admitted, the ecclesiastical court may go upon the modus; if denied, the ecclesiastical court cannot proceed, for defect of trial; and if so, it is the common suggestion for a prohibition in the court of king's bench; but if you come there for a prohibition, you must first shew the modus has been pleaded in the ecclesiastical court, and denied there; And no other court has the cognizance of it but the court of king's bench. And therefore I will not make such a precedent, as by a side wind will take away the jurisdiction of both courts at once.—And the motion was denied. 3 *Atk.* 628. 1 *Eden. R.* 276.

Bill to establish a modus.

A bill in equity, in the nature of a bill of peace will also lie to establish a modus, where a suit has been instituted for tithes in kind; but a bill to establish a modus or customary payment

(*r*) In what cases a prohibition must be sued for before sentence and where it may be had after, see Prohibition, 16.

in lieu of tithes, cannot be supported, where there has been no attempt to enforce the payment of tithes in kind. Lord *Coventry* v. *Burslem*, 1 *Gwill.* 1596. See also *Gordon* v. *Simkinson*, 11 *Ves.* 509. And it is also necessary, that the ordinary should be made
[459] a party to the bill. *Ib.* And the court, if doubtful of the modus, directs an issue to be tried by a jury. 2 *Anst.* 564. *& seq. Mitford,* 127. *& seq.* 9 *Vin. Abr.* 78, 79. *Vid. infra,* VII. 12. *Tithes how to be recovered.* But a plea, that the defendant obtained a verdict and judgment against the plaintiff, upon stat. 2 & 3 *Ed.* 6 *c.* 13. was allowed to be good. *Nels. Rep. in Cha. temp. Finch,* 13. And the court has frequently refused to direct an issue, if the modus appeared, upon the statement of it, to be bad. See *Torriano* v. *Legge,* 1 *Black. Rep.* 420. [*Rayner,* 521.] and *Bishop* v. *Chichester,* 2 *Bro.* 161. [An issue involving the payment of the modus, and also the extent of the district which it was contended it covered, is double, and therefore irregular: *Semb.* The fact of payment cannot be proved by reputation, but a lease would be evidence of a fact of reputation. (9)]

In the *Archbishop of York and Dr. Hayter* v. *Sir Miles Stapleton and others,* Feb. 21. 1740; the archbishop was entitled, in right of his see, to the rectory of Milton in Yorkshire; and granted a lease for three lives to archdeacon Hayter, who made a derivative lease to one Taylor. And this bill was brought by the archbishop and Dr. Hayter, for an account of tithes in kind, and to establish the custom of setting out the corn in stooks. It was objected, that there is no foundation for this bill; because Dr. Hayter having made a lease to Taylor, is not entitled to any account, and cannot maintain a bill to establish a custom of setting out in stooks or stacks, which is a mere right. By the lord chancellor *Hardwicke:* I am of opinion, the bill to establish the custom is well brought; and that the person who is entitled to the inheritance is properly made a party, notwithstanding the tithes themselves were out in lease at the time for which the account is prayed; for otherwise it might introduce great inconveniencies by a collusion between the lessees and the occupiers; and that a bill may be even brought, without praying an account, to establish a mere right only, appears from the common case of bills for establishing moduses. (1) And therefore I shall direct an issue to try the custom. 2 *Atk.* 136.

(9) *White* v. *Lisle,* 4 *Madd. R.* 214.

(1) Bill lies to perpetuate the testimony of witnesses to prove a *modus.* *Somerset* v. *Fotherby,* 1 *Vern. R.* 185.

V. Of the several particulars tithable.

I. *Corn and other grain, as [wheat, barley, oats,] beans, pease, tares, vetches, [and herein of balks, headlands, stubble, and after-eatage of corn fields*, p. 461.]

II. *Hay and other like herbs, and seeds, as clover, rape, wood, broom, heath, furze*, p. 467.

III. *Agistment or pasturage* (2 *Anst.* 498. 500.), p. 473.

IV. *Wood*, p. 478.

V. *Flax and hemp*, p. 490.

VI. *Madder*, p. 491.

VII. *Hops*, *ib.*

VIII. *Roots and garden herbs and seeds, as turnips, parsley, cabbage, saffron, and such like*, p. 495.

IX. *Fruits of trees, as apples, pears, acorns*, p. 496.

X. *Calves, colts, kids, pigs*, p. 498.

XI. *Wool and lamb*, p. 499.

XII. *Milk and cheese*, p. 507.

XIII. *Deer and conies*, p. 514.

XIV. *Fowl*, p. 515.

XV. *Bees*, p. 516.

XVI. *Mills, fishings, and other personal tithes*, p. 516.

[XVII. *Marriage goods in Wales*, p. 521.]

I. *Corn and other grain, as [wheat, barley, oats,] beans, pease, tares, vetches, [and herein of balks, headlands, stubble, and after-eatage of corn fields.]* [461]

1. Corn is a prædial great tithe; and is tithable according to the custom of the place; and is commonly tithed by the tenth shock, cock, or sheaf, where the custom of the place is not otherwise. *God.* 393. Corn.

[The regular mode of tithing *wheat* is by the sheaf (2), though Wheat.

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(2) For this is the first convenient state in which the tithe can be collected after the corn is cut. *Per* lord *Ellenborough* in *Shallcross* v. *Jowle*, 13 *East.* 267. See the cases collected by *Lawrence* J. in *Halliwell* v. *Trappes*, 2 *Taunt. R.* 58., and *Smyth* v. *Sambrook*, 1 *M. & S.* 70.

Rakings of corn gathered into sheaves are not due of common right, by which exemption, rakings left involuntarily, and without

there are cases to shew, that if in shocks, it is tithable that way. (3)

Of common right the owner of the corn ought to cut down and prepare the same, and to make it up into sheaves, cocks, or shocks; and if the owner refuse to do it, the parson may sue him for the same in the spiritual court; but then the suit ought to be special, for not setting them forth in cocks, and not generally for not setting them forth. But having made the corn into sheaves, he is not bound to set it up in heaps, unless the custom of the place oblige him thereunto. *Wats. c.*49.

If a prescription be, to pay certain sheaves of corn for all tithes of corn, this is no good prescription; for the parishioners ought to make it into sheaves: and therefore part of his duty in kind cannot be in satisfaction of the residue. *Wats. c.*49.

If the custom of the place be, to measure forth to the parson the tenth part of the corn whilst growing upon the land; it seemeth that this manner of tithing ought to be observed (4); or if the custom be, that the parson ought to have for his tithe of corn the tenth land of corn beginning at such land as is next to the church, this custom is good; but when in such case the parishioners by covin, to defraud the parson, did not manure and sow such lands (the corn of which would by the custom be to the parson) so sufficiently as their other lands, and the parson therefore did sue in the spiritual court, generally, for the tenth

fraud, are alone meant. *Wats. C. L.* 486. *Anon. Cro. Car.* 596. *Hob. R.* 11.

(3) *Mantell* v. *Price, Gwm.* 1504. Thus, if by custom tithe corn has been paid in any other manner, as by gathering the sheaves into shocks (*Archbishop of York* v. Sir *M. Stapleton,* 2 *Atk. R.* 136.) or making them into cocks, (*Wats. Cl. L.* 510.,) the custom must be observed, and the tithe still paid in that manner, (*Degge, c.* 3. 235.): and where the farmer usually put the sheaves into shocks, and in case of bad weather, opened them when dry; this benefit, together with the additional labour of the farmer, was held to support a custom of rendering the eleventh instead of the tenth shock. *Smyth* v. *Sambrook,* 1 *M. & S.* 66.

(4) But since the decisons in *Halliwell* v. *Trappes,* &c. such a custom would probably now be considered void; it is quite impossible to collect a fair tenth by any such admeasurement, and the tithe owner is exposed to injury from the partial manuring or sowing particular spots, while others are neglected. Hence, though by the civil law he may be entitled only to the tenth ridge, (2 *Leon. R.* 70.) by common law, corn must be cut and collected into equal portions before it can be tithed. And see *Degge, c.* 3. 236. *Wats. C.L.* 539. *Ledgar* v. *Langley,* 1 *Sid. R.* 283. *Knight* v. *Halsey, D. Proc.* 2 *B. & P.* 196. *Gwm.* 1554. S. C. *Collyer* v. *Howes,* 3 *Anstr. R.* 954. *Gwm.* 1490. And *per* Lord *Ellenborough* in *Shallcross* v. *Jowle,* 13 *East.* 267.

sheaf and shock, and a prohibition was awarded because it was said that the parson might have his remedy at the common law for the fraud; yet afterwards in the same case a consultation was granted, *Wray* chief justice saying, that this custom was against common reason. *Wats. c.* 49. 2 *P. Will.* 569. [*Bohun on Tithes, ch.* 2. *c.* 36.]

If the custom be, that the odd sheaves or shocks, under the number of ten, shall not be tithed, by reason that they set up the tithes in heaps or shocks, which of common right the owner of the corn is not bound to do; the owner is not bound [462] to divide the said sheaves or shocks, and set forth the tenth thereof, for that such custom upon such consideration is good. *Wats. c.* 49. (See more of Custom, *infra*, VI. "*Of the setting out,*" *&c.*)

Barley and oats.

[*Barley* and *oats* become first tithable when put into cock (5); and the mere labour of ventilating the cocks in wet weather by opening them, is not such an additional labour as will support a custom of paying less than the full tenth. (6) The parson is entitled to the rakings of the tenth cock of barley, which must be raked by the farmer's servant; and if he has paid for it, he is entitled to an allowance for that expence. (7)]

Balks and meres.

2. It is laid down in all the old books, that tithes are not to be paid for the herbage of meres or balks in corn fields; but that the same are freed thereof by the common law and custom of the realm. 2 *Inst.* 652.

Headlands.

3. So, it is said, no tithes shall be paid for hay which groweth upon headlands, where the horses and plough turn when the land is ploughed, if there be alleged a custom not to pay this, and also it be averred that the headland is only sufficient to turn the plough. 1 *Roll's Abr.* 646. (8)

Stubble. (9)

4. So, if a man pay tithes of corn, it is said, he shall not pay any tithes for the stubble which groweth the same year upon that land, though the same be cut for thatch or other uses. 2 *Inst.* 652. 1 *Roll's Abr.* 640.

After-eatage. (9)

5. So, if a man pays tithe of corn, he shall not pay any tithes for the after-pasture of that land for that same year, nor for agistment in such after-grass. 1 *Roll's Abr.* 641.

[Nevertheless, notwithstanding these great authorities, the modern determinations in equity are directly contrary; for that the balks and meres, the headlands, stubble, and after-eatage,

(5) *Woodshaw* v. *Hill*, cited 1 *M. & S. R.* 72. *Erskine* v. *Ruffle*, 5 *Bac. Ab.* 74, 75. *Gwm.* 961.
(6) *Smyth* v. *Sambrook*, 4 *M. & S.* 70.
(7) *Filewood* v. *Kemp*, 1 *Hagg. R.* 491.
(8) *Chapman* v. *Barlow*, *Bunb. R.* 184.
(9) *Andrews* v. *Lane*, *Gwm.* 477. *Johnson* v. *Aubrey*, *Cro. El.* 600. *Chapman* v. *Keep*, 2 *Wood's D.* 421.

are as much a part of the increase of that same year as the corn or hay. (*s*)]

Tares cut to feed cattle. 6. A prescription may be within a parish, that by reason they have not sufficient meadow for milch kine and draught cattle, they have used to cut some of their tares green, and give them to the aforesaid stock, and to be discharged of tithes for the same: and this is a good custom and consideration, for that the parson hath an advantage thereby as well as the parishioner, namely, in the tithe milk and manuring of the other corn land; and the [463] matter is, and want of meadow or pasture; and the surmise is as if it had been said that *for want of* meadow and pasture, they have used to eat their meadows with their plough cattle, and for so much as they did eat, to pay no tithes. *Wats. c.* 49. *Bunb.* 279. [See *infra*, II. 1. *Hay*, &c. 4.]

So, if a man, according to the custom of the country, doth sow his land to feed his horses for tillage, and the use hath been to suffer the horses to be fed upon the land without any mowing of the grain; the parson shall not have any tithes thereof, because it is no more than pasture for his horses. *Wats. c.* 49. (1)

Beans and pease. (2) 7. If a man gather green pease to spend in his house, and there spend them in his family, no tithes shall be paid for the same; but if he gather them to sell, or to feed hogs, there tithes shall be paid for them. 1 *Roll's Abr.* 647. *Deg. p.* 2. *c.* 3. (3)

(*s*) But in *Tennant* v. *Stubbin*, in the exchequer, *Michaelmas term*, 36 *Geo.* 3. [3 *Anst. R.* 610. *Gwm.* 1430.] This passage of Dr. *Burn* was adverted to and denied to be law. It was there held, that stubble cut for fodder was not tithable, unless there had appeared to be fraud in leaving the stubble unusually long. The Court did not recollect any case to the contrary, as this note supposes. *Ex relat. M. Anstr.* As to after-eatage, *vid. infra, III. Agistment*, 7. *in the note*.

(1) Grass, clover, or tares, separated from the soil *by an instrument*, and used green, are a great tithe: but if separated by the *mouth of the animal*, are an agistment and a small tithe. *Lagden* v. *Flack*, 2 *Hagg. R.* 306, 307. See *infra*, II. *Hay*, &c. 4.

(2) Pease are not tithable in the wad, but in cock. 1 *M.* & *S.* 74. So *semb.* of beans, for that is the first stage in which they become of *primâ facie* equal parcels, so as to be capable of comparison.

(3) *Toller* (*ch.* 4. 119.) has adopted this doctrine, saying, no custom is necessary to effectuate this common law-exemption. *Mirehouse* has collected ancient authorities in its favour (*ch.* iv. § 8.), but differs in opinion. The *nature*, and not the *subsequent use*, of an article must surely determine its tithability; the converse, *viz.* "that subsequent use of an article not originally tithable, shall not make it tithable," is certainly true. See *per* lord *Hardwicke*, in *Walton* v. *Tryon*, *Amb. R.* 130. *Gwm.* 821.; and see *Sims* v. *Bennet*, *Gwm.* 889. In *Pearse* v. *Hall*, 2 *Wood's Dec.* 456., it seems implied that no such exemption exists. In *Williamson* v. *Lord Lonsdale*, *Dan. R.* 49. 171. 5 *Pri. R.* 25., it was alluded to as a ground for a similar exemption of *potatoes* and *turnips* so used: but it was declared a solitary exemption; and *potatoes* and *turnips* so used were declared tithable.

It hath been disputed, whether the tithe of beans and pease, gathered by the hand, and sold for man's food, is a great or small tithe. As in the case of *Sims*, vicar of Eastham in Essex, against *Bennet* and *Johnson*, occupiers of lands within the said parish, and *Wilks* and *Hitch*, impropriators of the rectory of the said parish; Dec. 6. 1762 (4): Mr. Sims, the vicar, brought his bill in chancery in the year 1756, setting forth, that by the endowment of the vicarage he is entitled to the tithes of gardens and curtilages, and all sorts of tithes, except the tithes of sheaves, and hay, and mills [*præter decimas garbarum et fœni et molendinorum ad ventum*]; that the defendants Bennet and Johnson, holding several parcels of land in the said parish, did in the same year cultivate several pieces of such land with beans and pease, of such sort as are generally used for the food of man, which they gathered in the months of June, July, and August, by the hand, in the field, by plucking them from the stalk whilst green, and sent the same to market, and sold them for the food of man accordingly; and insisting, that by the gathering beans and pease by the hand, so cultivated as aforesaid, he the said Sims, as vicar, by virtue of the said endowment, became entitled to the tithe thereof, and that no tithe ought to be paid for the same to the impropriator, nor ought beans and pease so cultivated and gathered by the hand, by plucking from the stalk whilst green, to be considered as part of the tithes appropriated to the rectory. To this bill the defendants put in their answers. And the defendant Bennet said, that in the year 1756, he sowed thirteen acres or thereabouts with pease and beans, in the open fields in the said parish, and believed that in June, July, and August, in the same year, he gathered ten acres and a half or thereabouts of the same by the [464] hand in the field, by plucking them from the stalk whilst they were green, and sold them in a cart by retail by pecks and smaller quantities, in and about the parish of Eastham, and in the streets of London, and the remainder of such pease and beans were gathered into the barn and threshed. And the defendant Johnson said, that he sowed five acres of beans and pease in like manner, and part thereof he plucked by the hand when green, and sold the same in London streets and at market, and gathered and threshed the remainder in the barn. And both the said defendants said, that all their ground in the said parish, sowed with pease and beans in the said year, was ploughed for that purpose, and no part thereof was dug with a spade except under or near the hedges, where the same could not be ploughed, or in such places as were too wet to be ploughed; and that the tithe of all beans and pease, whether gathered green or otherwise, having

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(4) 5 *Bro. P.C.* 586. 7 *id.* 29. 1 *Ed. R.* 382. S.C. See *Austen* v. *Nicholas*, 7 *Bro. P.C.* 9. *Gumley* v. *Burt*, *Bunb. R.* 169.

been always paid to the rector, and esteemed to belong to him, they had therefore compounded with the impropriators for the same, and hoped they should not be compelled to account also with the vicar for the same tithes. The defendants Wilkes and Hitch, in their answer, insisted on their right as impropriators. Witnesses were examined on both sides. Several of whom deposed, that such pease and beans as are used for the food of man, had been cultivated in the fields and grounds of the parish of Eastham, only for about thirty years past, and were cultivated and gathered green off the stem, as usually done in a garden (save only that in the field the plough hath been generally used and in the garden the spade), and in rows, but in a different manner from those planted and sown in fields in the common course of husbandry for provender, and not for man's food. And one of the witnesses, Mr. Wyat, vicar of the parish of Westham (adjoining to that of Eastham), said, that in the year 1753, he commenced a suit in chancery against the impropriator and others of his said parish for such tithes, and that the then lord chancellor decreed in his favour, and he hath enjoyed the said tithes ever since. On hearing, the lord keeper Henley decreed, Nov. 10. 1760, that the vicar's bill should be dismissed, without costs. Upon this, Mr. Sims appealed to the house of lords, setting forth the following reasons: 1. It is admitted by the respondents, that if the tithe of beans and pease, cultivated in [465] a garden-like manner, and gathered by hand whilst green, is a *small* tithe, the same is not included in the exception out of the vicar's endowment. Many arguments may be offered to prove it such. The quality of all tithes is to be determined at the time of severance, when the right accrues. The same thing which produces a great tithe in one state and mode of culture, produces a small tithe in another. If clover is cut for hay, it is considered as a great tithe; when suffered to grow for seed, it is considered as a small tithe. (5) This is also the case of tares; when cut green, they are referred to the class of small tithes; when matured and dried before cut, they are referred to the class of great tithes. (7) The tithe in question is certainly not a tithe of corn or grain; and it bears two marks of a small tithe; the one, that it is in the nature of a garden tithe, being distinguished out of the description, not by difference of culture, but merely by the locality of setting beans and pease in fields:

Tares [or vetches. (6)]

(5) *Wallis* v. *Pain*, *Com. R. infra*, *II*. 4.

(6) Become first tithable in cocks, and not in the wads, which are of unequal sizes, 1 *M. & S.* 74.

(7) *Hodgson* v. *Smith*, *Bunb.* 279. 1 *Ray.* 128. *contra*, viz. that *tares*, whether green or ripe, are a great tithe, and belong to the rector, [if cut with an *instrument*, not if severed by *the mouth of the animal*. 1 *Hagg. R.* 306, 307. See *infra*, *II*. "*Hay*," &c. 1.]

the other, that it is a new and modern culture. 2. Supposing the tithe in question to be a *great* tithe; still the vicar was intended to be endowed with it, because it is not included in the exception out of his endowment. Pease and beans plucked by the hand, whilst green, from the stem, however cultivated, or wherever planted, can never be tithed under the description of *decimæ garbarum.* Spelman in his glossary interprets *garba* to be *faciculus* either of fruits or wood. Du Fresne calls it *spicarum manipulus.* And Matthew of Westminster saith, *frumenti manipulus quem patriæ lingua dicimus* sheaf, *gallice vero* garbam. But the tithe in question cannot fall under the meaning of the word *garba*, being set out and taken by a measure totally different. 3. It doth not seem an objection of weight to the appellant's demand, that if tithes are paid to the vicar for pease and beans gathered green, another tithe will be claimed by the rector, when the stalks ripen and are cut down, by which means a double tithe is said to be payable for the same thing. This will appear otherwise, when the matter is considered not in the light of paying two tithes for one thing, but of dividing the same tithe between two different owners, according to the grant of appropriation. The vicar will have his tithe of what is actually [466]
gathered green, and the rector of what is left, after it shall be cut down. 4. It is submitted to be an objection of as little weight as the objection just answered, namely, that in consequence of the appellant's reasoning, the farmer will have it in his power to determine the property of tithes between rector and vicar, from the manner or place of culture, or time of gathering. But this is a contingency, which attends this sort of right; the occupier being allowed by law to cultivate his lands, as he and the landlord shall think proper; which makes tithes, in their own nature, a fluctuating and uncertain inheritance.—— On the other hand, the respondents hope the decree will be affirmed, for these (amongst other) reasons: 1. Because a vicar cannot claim tithes of any kind but by endowment, or by usage (which is only evidence of an endowment). In this case there is no evidence of usage; and therefore if the vicar is not entitled to the tithes in question under the endowment, he is not entitled at all. But, 2. By the endowment the tithes in question are excepted out of the grant to the vicar; for the words *decimæ garbarum*, in the exception, have been always considered as technical terms, appropriated to, and descriptive of, great tithes, and to distinguish them from small tithes. And *garba* in its signification comprehends pease and beans growing in fields, as well as all other sorts of corn and grain growing in fields. (8) So that pease and beans are in their

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(8) Pease and beans were anciently *garbed* or bound in sheaves. *Finch*. 2.

own nature a great tithe, and excepted out of the vicar's endowment in this case, under the name of *garbæ*. 3. As to the objection, that in the present case, the pease and beans being plucked green, and sold for the food of man, they are applied to the same use as beans and pease growing in gardens, which are a small tithe; and that this tithe ought to take its denomination from the use the thing tithable is applied to, and therefore is a small or vicarial tithe, and not within the meaning of *decimæ garbarum*: It is answered, that all the cases relative to tithes, taken together, serve to prove, that the law denominates and adjudges tithes to be great or small, according to the nature of the thing, and not from the mode of cultivation, or use to which the thing is applied. And therefore in this case, the application of the pease and beans in question for the food of man, they not being nor falling under the denomination of tithes of gardens, technically called *decimæ hortorum*, ought not to convert the tithes in question into small
[467] tithes. —— And, after a full hearing, Dec. 6th and 7th, 1762, the lords affirmed the decree. (*t*)

II. *Hay, and other like herbs and seeds; as clover, rape, woad, broom, heath, furze.*

1. By a constitution of archbishop Winchelsea, it is ordained, that the tithes of hay wheresoever it groweth, whether in large meadows or small, or *in the highways*, shall be demanded and (as is expedient) shall be paid to the church. *Lind.* 191.

In the highways], In chiminis: But in a constitution of Gray archbishop of York, from which this constitution is taken and in a great measure copied, it is *in chevisis*, in the fore acres or heads of the ploughed land; (although the common law, as it hath been said, will not admit of this.) *Johns. Winch.*

It hath been resolved, that if a man cut grass, and before it be made into hay, but only put into swathes, he carrieth and giveth it to his plough cattle for their necessary sustenance, not having sufficient for their sustenance otherwise; no tithes shall be paid thereof. 1 *Roll's Abr.* 645. *Bunb.* 279. (*u*)

But in the case of *Webb* and *Warner*, *M.* 2 *J.*, when the inha-

(*t*) And see *ante*, II. 2. But where it appeared that the vicar had *by prescription* a right to the tithes of pease and beans set and planted in rows and ranks, and managed with a spade and hoe in a garden-like manner, the court of exchequer held, that the right continued although the ground was prepared with a plough. *Nicholas* v. *Austen* or *Elliot*, *Bunb.* 19.; affirmed on appeal, 2 *Bro. P. C.* 31. [And see *Austen* v. *Nicholas*, 3 *Gwill.* 615. 7 *Bro. P. C.* 9. But the impropriator has the right, if the vicar does not show an endowment or usage to the contrary. *Gumley* v. *Burt*, *Bunb. R.* 169.]

(*u*) S. P. *Collyer* v. *Howse and Reid*, 2 *Anst.* 481.

bitants of divers marshes and fenny lands, who used to gather a rough hay, called *fenny fodder*, for want of sufficient grass to sustain their beasts in winter, alleged that they did this for the sustenance of their beasts and the better increase of their husbandry, and ought therefore to be freed from the payment of tithes; the court held, that this surmise was not sufficient, for one may not prescribe in *non decimando*: and in that it is alleged they bestow it upon their cattle there, that it is not any cause of discharge; for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle; whereby no tithes should be paid. *Cro. Jac.* 47. [See *infra*, 4.]

Hay is a prædial great tithe; and is to be tithed in swathes, windrows or cocks, as the custom of the place is. *God.* 412. [468]

Of common right, it seemeth that grass is tithable when it is put into grass cocks, and not before; for that then the tenth may be severed from the nine parts. *Wats. c.* 49.

In the case of *Fox* and *Ayde*, *E.* 1729, in the chancery; it was objected, that the parishioners *de jure* ought to make their tithe grass into hay. But the lord chancellor King declared the law to be otherwise; and interrupted the counsel when they began to speak to this, saying that all which the parishioners were bound to do was to cut down the grass and divide it into ten parts, after which the parson was to make it into hay; and that this had been so resolved in a Devonshire case (the case of one *Reynolds*), 2 *P. Will.* 520.

Yet in the notes upon the said case, by the editor, it is observed, that it is called the tithes of hay, and not of grass: and so is the aforesaid constitution. (8)

But whatever the owner is obliged to do of common right, the custom of every place is to be observed; and therefore, if the custom be to measure out the tenth part of the grass standing for the tithe thereof, and that the parson shall cut and make it, this is good [*but see last note*]. And in this and all other cases, when

(8) Hay is not tithable in the swarth, but must be tedded or fairly thrown abroad from the swarth; and it is afterwards tithable in a state when it is neither grass nor hay, *viz.* in *grass* cocks, or those cocks into which it is first collected after cutting and tedding. *Newman* v. *Morgan*, 1 *Campb.* 305. 10 *East*, 5. *Halliwell* v. *Trappes*, 2 *Taunt.* 55. 2 *New. R.* 173. *Smith* v. *Sambrook*, 1 *M. & S.* 66. 70. See *infra*, 471. No action therefore will lie against the parson for not taking away the tithe of grass set out in the swarth. *Moyes* v. *Willett*, *clerk*, 3 *Esp. N.P. C.* 31. Putting it into *hay* cocks before tithing, can only be done by consent. Per *Le Blanc* J., *Shallcross* v. *Jowle*, 13 *East. R.* 268. A custom to put it into cocks without raking round them, is bad. *Staughton* v. *Hide*, *Gwm.* 566., and other cases. *Mirehouse*, 60. *n.* 2. The subsequent use of hay, by the mouths of beasts of the plough or pail, or sheep, does not exempt it from tithe. *Webb* v. *Warner*, *Cro. J.* 47.

the tithe of the grass is set forth, and the owner is not bound to make the parson's tithe into hay; the parson *de jure* may make the grass into hay upon the land on which it grew (9), although the usage time out of mind hath been to the contrary: and it is needless for the parson to allege a custom for the doing of it. *Wats. c.* 49.

The finding straw for the body of the church, is no discharge from tithe hay, because it is no advantage to the parson, who is not charged with the repairs of the church. *Cro. Eliz.* 276. (1)

But a meadow in the parish, of which the parson and his predecessors had been seised time out of mind, was judged a good consideration for the parishioners to be discharged of tithe hay; for it shall be intended that it was originally given on that account. 1 *Roll's Abr.* 649.

After-mowth. 2. Rolle says, that of aftermowth, that is, the second mowth, tithes shall be paid *de jure*, without a special prescription to be discharged by payment of the tithes out of the first mowth, and then it shall be discharged. 1 *Roll's Abr.* 640. (2)

[469] But Sir *Simon Degge* says, that tithes are not to be paid of the aftermaths of meadows; but if the meadowing be so rich that there are two crops of hay got in one year, there the parson shall have tithe as well of the latter as of the former crop. *Deg. p.* 2. *c.* 3. 237.

But if the occupier of the land can prescribe, that in consideration the owner doth make the first tonsure into good and sufficient hay, and set it forth in cocks sufficiently dried, then he shall be discharged of the tithes of the aftermowth; this is a good prescription and discharge, by reason of the labour and costs he bestowed in making the first tonsure into hay. *Boh.* 46, 47. (3)

Or if the prescription be, to be discharged of the tithe of the aftermowth, only upon consideration that they have used time out of mind to cut down the grass of the first mowth, and the same to tedd and shake abroad, and the same grass so dispersed and cast abroad to gather into weaks and windrows, and put it into small cocks at their own costs; this is sufficient, though it be

(9) *South* v. *Jones*, *Stra. R.* 215. taking a reasonable time to do so. 3 *Bulstr.* 336. *Gwm.* 424.

(1) *Scory* v. *Baker*.

(2) *Grysman* v. *Lewis*. *Cro. Eliz.* 446. *Gibs.* 676. *Margetts* v. *Butcher*, *Gwm.* 531. *acc.* See cases collected, *Mnch.* 41.

(3) *Johnson* v. *Aubrey*, *Cro. El.* 660. *Moor*, 910. *Green* v. *Austen*, *Cro. Ja.* 116. *Anon. Cro. Car.* 403. The case of *Durrant* v. *Booty*, 2 *Lutw.* 1071., went so far as to allow a custom to discharge this tithe, where the occupier made the first mowth into equal cocks, and thus set them out at his own expence: but this is contrary to the late rule in *Newman* v. *Morgan*, *supra*.

not made into perfect hay. *Cro. Jac.* 42. (4) [So where the grass grew in a wet place, exemption from payment of this tithe was allowed in consideration of its being constantly carried by the occupier to a drier spot. (5)]

And in the case of *Norton* and *Briggs*, *T.* 9 *W.*, it was said by *Treby* chief justice, that tithes are not payable for aftermowth *de jure;* and therefore it is but form to lay a custom to be discharged of tithes of aftermowth, in consideration of making the former mowing into hay; for tithes [were then considered] payable only of things renewing once in the year. *L. Raym.* 242. [But the opinion of *Richardson* C. J., that tithes shall be paid *de omnibus renovantibus et crescentibus* appears since to have been acted upon (6) except in the case of after-*eatage* or *pasture*.]

3. It hath been said, if a man pay tithes of hay, that no tithes ought to be paid *de jure* afterwards for the pasture [by animals] of the same land for the same year; for he shall not pay tithes twice in a year for the same thing: for the after-pasture is only the relics of the hay of which he hath paid tithes before. *2 Inst.* 652. 1 *Roll's Abr.* 640. After-eatage.

Nor for agistments in such after-*grass*. 1 *Roll's Abr.* 640. and *Bunb.* 1. 7. (7)

But, as was before observed, the modern determinations in equity will not allow of these distinctions; for the aftermowth or after-eatage are undoubtedly part of the increase of that same year. (*u*)

4. Dr. Watson says, the tithes of clover-*grass* shall go to him that hath the tithe hay. *Wats. c.* 39. Clover, [tares, vetches, and lucern.]

And in the case of *Franklyn* and *The Master and Brethren of St. Cross*, *T.* 1721; the vicar being endowed of tithe-hay, it was decreed, that he was thereby intitled to *clover*, *saint-foin*, and *rye-grass*, which are species of hay that is the genus. *Bunb.* 79. [470]

[Clover, tares, vetches, and lucern are tithable in the same manner as hay, as well therefore in their second as their first crop (8); at least if mown (9), and not depastured. (1)]

But the *seed* of clover is in its nature a small tithe. *Wats. c.* 49. [Clover-seed.]

Thus in the case of *Wallis* against *Pain and Underhill*, *H.* 1738,

(4) *Hall* v. *Fettyplace*.
(5) *Andrews* v. *Lane*, *Gwm.* 473.
(6) *Ibid.*
(7) *Smith* v. *Johnson*.
(*u*) This, it is apprehended, is a mistake. See *post*, *Agistment*, 7, in the note.
(8) *Collyer* v. *Howes*, 3 *Anstr.* 954. *Pomfret* v. *Lauder*, *Gwm.* 530. *Wallis* v. *Pain*, *Bunb.* 344. *Witherington* v. *Harris*, *Gwm.* 584.
(9) See p. 468.
(1) See p. 469.

a bill was exhibited in the exchequer by the plaintiff Wallis, who was tenant or farmer under the impropriator of the great tithes in the Parish of Prittlewell in Kent, and insisted, that the defendant Pain sowed a field with clover, which was cut for hay, and that he let the aftermath grow for seed, which was cut and threshed for seed, of which the plaintiff ought to have the tithe as a great tithe. The defendant Pain insisted, that he had paid the plaintiff for the tithe-hay of his clover; and that the aftermath of clover stood for seed, which was a small tithe, and payable to the vicar. And Mr. Underhill, the vicar, insisted upon the tithe of clover-seed as a vicarial or small tithe. By the depositions of several witnesses it appeared, that the difference between clover cut for hay, and that cut for seed, is considerable; when made into hay, it is cut while the grass is green, and fit for cattle to eat; when cut for seed, it stands till the stalk is good for little or nothing, and the seed is the only thing of value or regarded. It was argued for the plaintiff, that clover-seed is in the nature of it a great tithe, and therefore due to the plaintiff: for as tithe-hay is due to him, the seed of that hay must of consequence belong to him also; that where the parson is intitled to tithe-hay, he will be intitled to the hay made of clover as well as of other grass: and if to the hay, likewise to the seed. On the other side, it was insisted, that clover-seed is in its nature a small tithe: that the tithe of no seed was ever looked on as a great tithe; and as to what is said that the stalk and seed should go together, it is frequent that the seed or fruit of trees goes to the vicar, when the tree goes to the parson: wood is always reckoned a great tithe, and goes to the rector, unless the vicar be specially endowed with it; but acorns, as well as the fruits of all other trees, were always held as small tithes. Lord chief baron *Comyns* delivered the resolution of the court: That by the canon law, as long as the distinction hath been made between great and small tithes, which is as ancient as appropriations to the religious houses, who usually engrossed the great tithes, but left the small tithes to the curate, all seeds have been
[471] reckoned as small tithes. The common law seems to follow the canon law in this point. And all the resolutions relating to tithes which proceed from things newly introduced into England, have held them to be small tithes; as saffron, woad, flax, hops,
[Seeds.] tobacco. As to clover-seed, there doth not appear to have been any express determination in this point: But it is a seed, and all seeds are mentioned as small tithes. It is true that clover-grass made into hay is of the nature of all other grass made into hay, and consequently must belong to the parson, or other who is intitled to tithe-hay; but it does not follow, when it stands for seed, and is not made into hay, that the seed may not be small tithes. Rape-seed, caraway-seed, turnip-seed, mustard-seed, are

small tithes; but if the herb be growing with other grass and made into hay, it would be great tithe. And all the barons agreed in opinion, that the plaintiff's bill should be dismissed. Baron Parker seemed to doubt, as it partook of the nature of the stalk from whence it was taken. 2 *Com. Rep.* 633.

And it hath been decreed, since this case, that the seed of clover is a small tithe. *Bunb.* 344. [A. D. 1738.] *Pomfret* v. *Lauder*, *Gwm.* 530. (*x*)

A modus may extend to clover, although of late only brought into England, if the modus be such as covers all tithes of hay. *Bunb.* 20. (*y*) [Modus for clover.]

(*x*) In *Collyer*, clerk, v. *Howse* and *Read*, Serjeants-Inn-hall, 26th July, 1794, the principal question was, to determine the mode of setting out the tithe of clover-hay; the vicar insisting that it ought to be set out in cocks or heaps, as common hay; the defendants, that it ought to be set out, as they had done, in the swathe. No custom was proved to exist in the parish for setting out the tithe of *clover* in cocks; and it appeared by the testimony of farmers, that clover-hay is not in that neighbourhood made into cocks at all in the ordinary course of husbandry, unless in wet or uncertain seasons. For the plaintiff it was argued, that clover-hay was to be considered in exactly the same light as common hay. The general rule of law is, that tithes shall be set out at that period when they can first be severed from the nine parts, and the farmer is in no case, unless by special custom, bound to labour the commodity any farther. But as to hay it is settled, that in general it shall not be set out in the swathe, but in cocks: which is an ulterior process (1 *Roll. Abr.* 644.), and amounts to a determination, that in the former stage, while in the swathe, it is not in a fit situation to be severed: the same rule must apply to clover. But it was answered for the defendants, that the reason why common hay is set out in cocks, is because that is the best and established mode of cultivating the commodity, and the most proper period for accurately dividing the ten parts; but as there is no such process in clover, without loss to the farmer, the rule cannot extend to it. — And by *Macdonald* Ch. B. It can never be supposed that, for any purpose of tithing, the farmer shall be compelled to introduce an uncommon or disadvantageous mode of agriculture; but here it is proved, that clover is not customarily put into any shape analogous to grass-cocks, and that in most seasons such a process would be hurtful to the commodity. We cannot, therefore, make any decree which would compel the farmer to adopt this inconvenient mode of making his clover-hay. The only other way of tithing clover-hay seems to be in the swathe, which must, therefore, be taken as the proper method. But as the point is new, let the bill as to this be dismissed without costs. 2 *Anst.* 481. S. P. *Baker* v. *Athill*, 2 *Anst.* 491. But it has been since decided, that clover-hay is to be tithed in the cocks, and not in the swathe. 4 *Gwill.* 1489. [Setting out tithe of clover.]

(*y*) In *Wood* v. *Harrison*, *Amb.* 563., a modus was laid for clover, and objected to, the introduction of clover being of a modern date;

[Clover, &c. cut green.] [*Clover, tares, vetches, lucern,* or other grasses, cut by an instrument and given green from the swathe to animals, *e. g.* horses, &c. used in husbandry, are liable to tithe, if the occupier have sufficient other fodder *or sustenance* to support his cattle without necessarily having recourse to such green food. (2) The questions, whether there was any other sufficient fodder, or whether the horses were used in husbandry, are purely for a jury to decide. (3). "We have now," says *Richards* C. B. "the law as clear as can be: there must not be any other fodder in order to excuse the occupier from paying the tithes for green grass and tares which he has given to his cattle, admitting the principle, that this produce, as well as any other produce of the earth, is tithable; so that *primâ facie* it is tithable at all events, if you have other fodder. Now *other fodder* means exactly what food means." (4) It appears therefore that a person would not be permitted to cut clover, grass, &c. and give it green to his agricultural animals without its being tithed, provided he had other food with which to supply them at the same time. In *Dorman* v. *Currey*, the C. B. intimated that a horse employed generally in husbandry, does not lose its exemption by its being occasionally ridden. Subject to the above exemption, clover, tares, and grass separated from the soil *by an instrument*, and used green, follow the nature of their genus, and are a great tithe; but if separated by the *mouth of the animal*, are an agistment and a small tithe. (5)]

Rape Seed. 5. Rape-seed is a small tithe. (6) It has not been sown many [472] years in large quantities in this country. And I do not find or know of any judicial determination concerning this particular species of tithe. The method of cultivation of rape-seed is this: It is sown in August or September, and suffered to grow till the seed is quite ripe; and then it is cut down, with the greatest care, and if possible in calm weather, with sickles, lest any of the seed should drop from the pods, and be lost upon the ground. And for the same reason it is never bound up in sheaves, or made into hattocks; but as soon as may be, it is gathered upon a large cloth, brought into the field for the purpose; and upon such cloth is threshed and dressed; and then the seed is removed out of the field in sacks or bags. The ripeness of the seed when

but the court said it was a species of grass, and would be covered by a modus for grass made into hay; and directed an issue accordingly.

(2) *Mantell* v. *Paine*, *Gwm.* 1504. 5 *Pri.* 362. 4 *Wood's D.* 566. *Stevens* v. *Aldridge*, 5 *Pri. R.* 334.

(3) See the last case.

(4) *Dorman* v. *Currey*, 4 *Pri. R.* 109. *Dan. R.* 201. 206. *Wils. Exch. R.* 64. *Dorman* v. *Sears and others*, 6 *Pri. R.* 338. *Dan. R.* 195.

(5) *Lagden* v. *Flack*, 2 *Hagg. Rep.* 306, 307.; and see the cases cited *in notis*.

(6) *Robinson* v. *Brooke*, *Gwm.* 471.

proper for cutting, and the smallness of it, renders this method of cultivation absolutely necessary; for if it was to be bound up in sheaves, or gathered into heaps, and then removed in carriages or otherwise out of the field to be threshed and dressed, a great part of the seed would be shaken and lost, which would not only be a damage to the owner, but also to the land, for the [473] shaken seed would grow again, and spoil the future crop of grain.

It is usual for the occupier of the land to agree with the owner of the tithe, for the tithe of rape-seed, at so much an acre.

It never has been determined, in what manner the tithe of rape-seed shall be set out by the occupier of the land, where he does not agree to pay a composition for it. But the better opinion seems to be, that it should be set out by measure in the field, after it is threshed and dressed; as, from the manner of its cultivation, the owner of the tithe cannot sooner remove it from the land, and as he has no right to enter upon the land for any other purpose than to take away his tithe, which in this case is not capable of being taken away before it is threshed and dressed.

Woad.

6. Woad growing in the nature of an herb, the tithe thereof is a small tithe: as was agreed by all the justices, in the case of *Udal* and *Tindal*, *H.* 1 *Car.*, *Cro. Car.* 28.

Fern.

7. No tithes shall be paid of fern. 2 *Inst.* 652.

Heath, furze, broom.

8. It is said, that for heath, furze, and broom, tithe shall be paid; unless the party set forth a prescription or special custom, that time out of mind there hath been paid milk, calves, or other tithes, for the cattle that have been kept upon the same lands; in which case they shall not pay tithes. *God.* 413. *Gibs.* 608. [But *qu.* see IV. 6.]

Also if they be burned in the owner's house kept for husbandry within the parish, they may be discharged. *Wood. b.* 2. *c.* 2. *Boh.* 53. But otherwise if sold. *Boh.* 53.

So in the case of *Rolfe* and *Harding*, *M.* 12 *An.* It was admitted, that no tithes are due for furze spent upon the premises; but for furze cut into faggots and sold, it was decreed by the lord chancellor Harcourt that tithes should be paid. *Vin. Dismes*, Z. 31. (7)

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(7) Thus a prohibition was granted in a suit for tithes of *broom*, *heath*, *furze*, and *fern*, where it was suggested that defendant kept a house of husbandry, and used the broom to burn, and the furze to make pens on his ground for sheep, (*Dr. Watts*'s case, 3 *Keb. R.* 635.) the tithe owner having thereby procured *uberiores decimas*, on which principle alone the occupier appears to be exempted from paying tithes on articles otherwise *de jure* tithable. *Rooket* v. *Gomershall*, *Litt.* 367.

III. *Agistment or pasturage.*

Agistment, what.

1. Agistment is the keeping or depasturing of sheep, and of any kind of cattle, whether beasts or horses: And the tithe of agistment is the tenth part of the value of the keeping or depasturing of such sheep, beasts, and horses, as are liable to pay it. (8) And it is so called from the French *geyser*, *gister*, [*jacere*] to lie; because the beasts are levant and couchant, that is, lying and rising.

[474]

Agistment is a small [prædial] (9) tithe.

2. In the case of *The Vicar of Kellington* against *The Master and Fellows of Trinity College and others*, the vicar being intitled to all the small tithes, claimed by virtue thereof the tithe of agistment. And by the lord chief baron *Parker:* There is no doubt at this day but that agistment tithe is a small tithe: and the same was decreed to the vicar accordingly. 1 *Wilson*. 170, (*z*)

Due de jure.

3. This tithe, being the tenth part of the value of the produce of the land, is due of common right; because the grass which is eaten is *de jure* tithable, and must have paid tithe if cut when full grown. *L. Raym.* 137. 2 *Salk.* 655. (1) 2 *Inst.* 651.

For what cattle.

4. The general rule is, that this tithe is to be paid for beasts agisted for hire; or for dry or barren cattle, that do otherwise yield no profit to the parson: and not for cattle which are nourished for the plough or pail, and so employed in the same parish; because the parson hath tithe for them in another kind. 2 *Inst.* 652. *Deg. p.* 2. *c.* 5.

But if a foreigner that lives in another parish depastures ground with cattle bred for the plough and pail, to be employed in a foreign parish; he shall pay tithe for the agistment of such cattle. *Deg. p.* 2. *c.* 5. *L. Raym.* 129. (3)

(8) *Byam* v. *Booth*, 2 *Pri. R.* 267. *Ellis* v. *Saul*, 1 *Anst. R.* 332. *Scarr* v. *Trin. Coll.* 3 *id.* 761. *Gwm.* 1145. 3 *Anstr. R.* 760. *Hick* v. *Woodson*, 2 *Salk.* 655. 1 *Ld. Raym.* 137.

(9) *Scarr* v. *Trin. Coll. Cambridge* (1796), 3 *Anstr. R.* 760.

(*z*) In the case of *Illingworth* v. *Leigh*, which was a suit by *the vicar* for the recovery of agistment tithe, the court admitted the books of *lessees of the rectory*, containing entries of the receipt of that tithe after the determination of their lease, to support the claim of the impropriator to that species of tithe. 4 *Gwill.* 1615. [*Herbage* does *not ex vi termini* mean *agistment;* therefore the showing an old grant from the crown of "herbage" is not sufficient proof of title in persons claiming under the grantee the tithe of agistment; but the vicar was decreed entitled to an account of agistment tithe, shewing that he alone had taken the other small tithes. *Wood* B. *dissentiente*. *Scott* v. *Lawson*, 7 *Pri. R.* 267. And see S. P. *Byam* v. *Booth*, 2 *Pri. R.* 231.]

(1) *Comb. R.* 143. *Hicks* v. *Woodson*, *Cro. El.* 446. *Pory* v. *Wright*, *Hardr. R.* 184. *Monday* v. *Lovice*, *Moor*, 454. *Seld. c.* 11. 328.

(3) *Scowles* v. *Lowther*.

Also if the same cattle are turned off to be fatted, and are grazed, there tithes of agistment shall be paid: since they are no way beneficial to the parson in any other tithes. (*a*) And so of cows after they have become barren, and are fatted for sale. *Gibs.* 676. [Young cattle reared for pail or plough, or cows reserved for calving in the same parish when dry, shall not pay this tithe. (4)]

The like is to be said of horses; that while they are kept for the use of husbandry, no tithe shall be paid: but if horses be kept for sale, or to carry coals, or for the like offices which are profitable to the owner, and not profitable to the parson, tithe shall be paid for them. *Gibs.* 676. [1 *Rol. Ab.* 646. *Deg. c.* 5. 249. *Facy* v. *Long*, *Cro. C.* 237. So horses kept in one farm and used *occasionally*, but not habitually, on another in an adjoining parish, are within the general exemption of animals used in husbandry. (5)]

But saddle-horses shall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the use of a man's own family; in respect of the profit that otherwise accrues to the parson from these. *Bunb.* (6) 3. 8. 1 *Roll's Abr.* 641.

But if they be horses of travellers or others taken in as guest horses; it is agreed by all, that tithe of agistment is due, because no profit otherwise accrues to the parson from them. *Gibs.* 682. (*b*) [This tithe is payable in proportion to the value of the produce of the earth eaten on the land by animals paying no other tithe, though they are not a year on it. Thus sheep brought into a parish after shearing time, and sold or killed unshorn within the year, are liable to it (7), and sheep which have paid wool tithe are only exempt from it in the year in which wool tithe is paid. (8) Where a succession of sheep have replaced each other on the same land, the paying wool tithe at shearing time on as large a number as have ever been on the land at one time, will not exonerate from paying tithe on those sheep which in the course of the year have been sold or removed. (9)] [475]

In the case of *Thorp* and *Bendlowes* (1) in the exchequer,

(*a*) [*Edmond* v. *Sandys*, or] *Sandys* v. *Eastmond*, *Show. Cas. in P.* 192. [*Gwm.* 558. *Willis* v. *Herbert*, 3 *Wood's D.* 199.]

(4) *Anon. Hetl. R.* 100. *Holbeech* v. *Whadcocke*, *Hardr. R.* 184.

(5) *Filewood* v. *Button*, 2 *Anstr. R.* 498. See *Dorman* v. *Currey*, *ante*.

(6) *Underwood* v. *Gibbon*.

(*b*) [*Guilbert* v. *Eversley*,] *Hardr.* 35.

(7) *Smith* v. *Johnson*, *Gwm.* 607. *Howes* v. *Carter*, 2 *Anstr.* 500. *Bennet* v. *Peart*, 4 *Wood. D.* 236. But see *Poor* v. *Seymour*, *Bunb. R.* 313. *Gold's* case, *Ambl.* 149.

(8) *Rol. Abr.* 647. *l.* 20. *Com. Dig.* tit. *Dismes*, (H 5).

(9) *Bateman* v. *Aistroppe*, *Gwm.* 1048.

(1) 3 *Wood's D.* 38. *Gwm.* 899.

T. 1762. Thorp, as rector of Houghton in the county of Durham, filed his bill against Bendlowes (amongst other things) for the tithe agistment of his coach horses, suggesting that the horses were not kept for pleasure only, but that the defendant made a profit of them, by employing them to fetch his coals at ten miles' distance out of the parish, and in leading manure, bricks, and wood from the parish of Houghton to the defendant's lands in the parish of Darlington, which is the next adjoining parish. Which fact was proved in the cause. The defendant by his answer insisted, that the horses were kept for his coach, and for pleasure only, and were not liable to pay any tithe for agistment, as barren and unprofitable cattle. The court were unanimously of opinion, that coach-horses were liable to pay tithe of agistment, and decreed the defendant to account for the same, and to pay the plaintiff his costs.

For what lands. [See I. 5. II. 3.]

5. It hath been said, that if a man pay tithes in kind to the parson, for his lands, fleeces, and other things, going and arising upon his pastures, wastes, or other lands, he shall not afterwards in the same year pay tithes of agistment for the same pastures, wastes, or other lands. 1 *Roll's Abr.* 641.

But in the case of *Coleman* and *Barker*, *E.* 1726; where the suit was for the tithe of agistment of sheep which were depastured on turnips remaining on the ground unsevered, it appeared that the defendant had paid tithe wool, and after shearing time fed his sheep with turnips, by which they were bettered five shillings a sheep; and tithes were decreed for the depasturing of those sheep. *Gilb. Eq. R.* 231. [*Gwm.* 665.]

And the like was decreed in the case of *Swinfen* and *Digby*, *H.* 1731, *Bunb.* 314. For in such case, the sheep being turned off, to be fatted, cease to be profitable to the parson in any other way. (*c*) [And this, though turnips are cultivated to improve the land for corn, thereby giving *uberiores decimas* (2): so if they are folded to manure the soil, and are fed with turnips or vetches on land which has that year before paid the tithe of hay (3) or of corn. (4) For tithes arise *de die in diem* (5); and as the tithe owner is entitled to a tenth of the produce of the land, he is entitled to a new tithe as often as there is a new increase. (6) A composition for tithe of turnips, whether *pulled or eaten off*, where neither party considered it as an *agistment* tithe, is no evidence of perception of that tithe. (7)

(*c*) S. P. *Amb.* 149. *Gold's* case. [*Baker* v. *Sweet*, *Bunb.* 90.]
(2) *Coleman* v. *Barber*, *Gwm.* 665. *Daniell* v. *Tuffnall*, *Gwm.* 537.
(3) *Howes* v. *Carter*.
(4) *Bordley* v. *Tims*, *Gwm.* 540. *Hall* v. *Filter*, *Gwm.* 606.
(5) 2 *Ves. & Bea.* 335.
(6) See *Mirehouse on Tithes*, 47, 48.
(7) *Garnons* v. *Barnard*, 1 *Anstr. R.* 320.

Where sheep are fed in common fields belonging *to two parishes*, and yean and are shorn in one parish only, agistment tithe is due to the tithe owner of the other parish: for the agistor might have sheared a proportionate number of ewes, and let them yean in that parish where the agistment tithe is claimed. (8) If the parish in which the common lies is not clearly known, the owner of the *animal* (2 & 3 *Ed.* 6. *c.* 13. § 3.) must pay agistment tithe to the tithe owner of the parish wherein he lives.

Due in one parish though tithe of lambs and wool due in another.

In *Mickleburg* v. *Crisp.* (9), where a large common extended itself into different parishes, and by custom the owners of the cattle fed thereon paid tithe of such feeding to the parson of the parish in which they respectively lived, and not to the parson of the parish in which the cattle occasionally fed; this was held a good custom.

Tithes of commons appendant or appurtenant to farms belong to the tithe owners of those parishes where the farms lie to which they are appendant or appurtenant, being parts of them and passing incidentally with them. (1)

Of commons appendant or appurtenant to farms in other parishes.

The rule is otherwise of commons in gross. (2)]

Or in gross.

6. The tithes for depasturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the owner of the cattle. *Bunb.* 3. (3)

By whom to be paid.

For it is not due for the cattle, but for the produce of the ground on which the cattle are depastured. (*d*)

(8) *Hatfield* v. *Rawling*, *Gwm.* 1030. *notis.* See *Gwm.* 1027.

(9) 2 *Bro. C. C.* 444.

(1) *Lambert* v. *Cumming*, *Bunb. R.* 138. *Gwm.* 647. *Etherington* v. *Hunt*, *Gwm.* 1598. *Ellis* v. *Fermor*, *Gwm.* 1022. 3 *Wood's D.* 381. See *ante*, III. 10.

(2) *Fox's* case, *Hil.* 4. *Ann. B. R. fol.* 78., *in Error*. *Gwm.* 1027.

(3) And it might be impossible to find the agistor or owner of the animal. *Laurkin* v. *Wilde*, *Poph. R.* 126. *Freem. R.* 329. *Pothill* v. *May*, 1 *Bulst. R.* 171. *Hampton* v. *Wild*, *Cro. J.* 430. See *Pory* v. *Wright*, *Hardr. R.* 184. *contra.* But this is otherwise when *commons* are depastured. *Fisher* v. *Leman*, *Bunb. R.* 3. *in notis.* *Pory* v. *Wright*, *Hardr. R.* 184.

(*d*) 1 *Freem.* 379. *Fisher* v. *Leman*, 9 *Vin. Ab.* 38. *Bunb.* 3. *Willis* v. *Harvey*, 2 *Rayner*, 570., where this doctrine is illustrated by the following calculation: A farmer breeds an ox, and when three years old sells him to a grazier for 7*l.*; the parson is not entitled to 14*s.* or the tenth part of the carcase, but to *the tenth of the produce consumed by the animal;* he must therefore be paid thus:

		Keeping.	Tithes.
What is the price of keeping the	1st year,	1 0 0	0 2 0
	2d year,	1 15 0	0 3 6
	3d year,	2 5 0	0 4 6
		£5 0 0	0 10 0

In what manner to be paid.

7. This tithe has this peculiar difficulty attending it, that it cannot be taken in kind. For as it is no otherwise cut or severed than by the mouth of the animal, together with the other nine parts, and consumed at the same time, the person to whom it is due can only receive the value of it. (4)

And it hath been said, where there is no special custom to the contrary, that if this tithe be paid for guest cattle taken in, the tenth part of the money received is payable for agistment; if for the owner's cattle, then the tithe shall be according to the value of the land, after the rate of two shillings in the pound: for that they cannot otherwise be valued, or accounted for, because the profits of the lands for which they are paid, are received by the mouths of the beasts. *Wats. c.* 50. (*e*)

But this way of estimation, according to the value, is only for convenience; for the tenth part of the produce, and not a sum of money, is undoubtedly due *de jure*.

And this way of valuation, according to the pound rent of the land, cannot be any certain rule, especially where profitable and unprofitable cattle are depastured together; it being impossible in such case to adjust or ascertain how much of that rate, of two shillings in the pound, the unprofitable shall pay. But in all cases, the tithe of agistment of barren and unprofitable cattle is to be paid according to the value of the keeping of each per week. And the value of the keeping of a sheep, beast, or horse, upon any particular lands, is as easily ascertained, from the usual prices given for the depasturing of such sheep, beasts, and horses per week each, in that parish or neighbourhood, whether profitable cattle are kept at the same time upon the same lands together with them or not. (5)

[477] And it frequently happens, that the same lands pay several tithes in the same year. As suppose an occupier of land mows

(4) This tithe is always pecuniary, and cannot be specific. It is the only tithe in the kingdom which is not specific. *Chapman* v. *Smith*, 2 *Ves. R.* 506.

(*e*) *Hard.* 35. 184. *Bunb.* 1.

(5) It would seem that the *improved value of the animal* cannot be brought into the estimate; for this tithe is not for the animal, but for the value of the tenth part of the herbage eaten by it; where cattle are fed on *oil cakes* no agistment tithe is due, and their improvement cannot be estimated. *Ellis* v. *Saul*, 1 *Anst. R.* 342. Again, though one shilling and sixpence, (*Johnson* v. *Firebrace*, *Gwm.* 660.), or two shillings in the pound (*Holbeech* v. *Whadcocke*, *Hardr.* 184.), of the *yearly value of the land*, seem to have been allowed, an annual payment of two shillings for agistment was rejected in *Startup* v. *Dodderidge*, *Gwm.* 587; for the *quantum* of rent is not within the conusance of the tithe owner; and this mode of payment leaves the occupier power to diminish his rent by paying so large a fine that he would thereby get next to nothing.

any of his lands in July, and pays the tithe of the hay in kind. At the proper time he turns feeding beasts upon the eddish or after-grass, which must pay the tithe of their agistment during the time they are kept upon it, according to the value or usual price of the depasturage of such beasts per week upon such eddish or after-grass, in that parish or neighbourhood. After the eddish is consumed and eaten up by these beasts, other barren and unprofitable cattle are put and kept upon the same land during the winter; others again, for the spring eatage; which must pay the tithe of their agistment during the time they have been so kept upon that ground, according to the value of the keeping of every such beast or horse per week, upon such lands at that time and in that state. So that here the same land pays three or four different tithes in the same year; which is contrary to the doctrine generally delivered in all the old books, that the same lands shall not pay tithes twice in the same year. (*g*)

Modus.

8. In *Smith* v. *Roocliff. H.* 1717; the barons were of opinion, that a modus of one shilling in the pound for pasture, according to the value of the land, was a void modus; as is also a modus of one shilling in the pound, according to the value of the rent. *Bunb.* 20.

And the like was adjudged in *Harrison* v. *Sharpe*, *T.* 1724. The same being no other than payment of a part for the whole. *Id.* 174.

[Agistment on after-eatage or pasturage.]

(*g*) But that agistment tithe is not due for after-*pasturage*, [where the lands have been mown the same year, and paid tithe,] see *ante*, p. 469. *Green* v. *Austin*, *Yelv.* 86. 2 *Inst.* 652. 1 *Roll. Ab.* 641. [*Batchelor* v. *Smallcombe*, (*H.* 1818.) 3 *Madd. R.* 12. See all the authorities collected from *Chapman* v. *Keep* in 1742, *Gwm.* 779., to *Ellis* v. *Saul*, *supra*, in 1790.] For agistment tithe is not the tithe of the increase of the cattle, but the tithe of the land or herbage; which having paid tithe of the hay, shall not pay again in the same year. *Bunb.* 7. Therefore no agistment tithe is due for cattle fed on *oil cakes*, &c.; nor can this tithe be demanded on 3 *Ed.* 6. *c.* 13. § 3., which enacts, that "all and every person which hath or shall have any beasts or other cattle tithable, going, feeding or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes *for the increase of the said cattle*, to the parson, &c. of the parish where the owner of the cattle dwelleth." *Ellis* v. *Saul*, [*Gwm.* 1326.] 1 *Anst.* 832. [This distinction between after-*math* and after-*pasture* is accounted for by Mr. *Mirehouse* as follows: In the former case when each increase is cut, the soil may be said to be thereby again deteriorated, and the tithe owner less likely to have the full benefit of the following year's produce; in the latter there is no deterioration, but the land is benefited by the feeding, and the succeeding crop thereby rendered more sweet and profitable.]

IV. *Wood.*

Whether it is titheable de jure.

1. In the case of *Hicks* and *Woodson*, *H.* 8 & 9 *W.*, it is said, that wood is not *de jure* tithable, because it doth not renew annually; and that therefore in libels in the spiritual court for wood, they allege a custom. Although it was said, that the practice of the spiritual court at this day is otherwise: but the court did not regard that; for *Holt* chief justice said, that they made stones, gravel, and all things tithable. *L. Raym.* 137. 2 *Salk.* 656.

And prescriptions of *non decimando* for tithe wood have often been allowed; particularly in the wilds of Kent and of Sussex: which seemeth to suppose that it is not due of common right, but only by custom. *Gibs.* 686.

But in the case of *Jordan* against *Colley and others*, *E.* 1720: On a bill by the rector for tithe wood in the parish of Little Wenlocke in the county of Salop, as it had been time out of mind paid in that parish, against the defendants, as vendees of Sir William Forester: the defendants in their answer say, that no tithe hath been paid for this coppice wood called Holebrook coppice, when felled before, and that they never heard that any tithe or modus had been paid for wood in that parish. It was insisted upon for the defendants, that tithe wood was not due of common right, and therefore that the proof lay upon the plaintiff; and that it was only founded upon a canon in bishop Stratford's time, and therefore that the defendants need not allege any prescription or custom by way of exemption: But it was answered for the plaintiff, that occupiers must always set forth an exemption. And by the court: The defendants ought to have shewn some exemption; and there is no instance, that a parish can prescribe in *non decimando* for tithe wood; wilds and hundreds are upon another consideration. — But note, says the reporter, although the court decreed against the defendants, yet it doth not seem to have been yet certainly determined, that tithe wood is due of common right. *Bunb.* 61.

But in the case of *Boulton* and *Hursler*, *T.* 2 *G.* 2. The plaintiff, having libelled in the spiritual court for the title of *sylva cædua*, the defendant moved the court of king's bench for a prohibition: And the suggestion was, that they were timber trees, and of twenty years' growth. It was urged further, that the court might grant a prohibition even upon the face of the libel, because the demand is set forth generally, and therefore must be intended that this tithe is due of common right; whereas the right of
[479] tithe wood is only by custom. And that was the reason given in the case of *Hick* v. *Woodson* (6), why a hundred may prescribe in a *non decimando* of tithe wood; for as by custom it grows due,

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(6) *H.* 1696, 2 *Salk.* 655. 1 *Ld. Raym.* 137.

by custom it may be made not due. But the court said, that this reason indeed was laid down by the judges of this court in that case; but they said, this has never been allowed for law by any of the other judges of Westminster-hall. And it certainly is not law: for tithe is as much due of *sylva cædua* by the law of England, as any other tithe whatsoever. And judge *Reynolds* said, This may evidently be shewn not to be the reason of this law in relation to hundreds; for if it was, the same reason would prove that every private man may prescribe in a *non decimando* of this nature. And for this reason, and also because the defendant in the spiritual court had not alleged in his plea there that the trees were of twenty years' growth, a prohibition was denied. 1 *Barnard.* 71.

Whether it is a great or small tithe.

2. That wood is a prædial tithe is plain; but whether great or small, hath been a question between the parsons and vicars: and it hath been resolved, that if a vicar be only endowed with the small tithes, and have by reason thereof always had tithe wood, in such case it shall be accounted a small tithe; otherwise it is to be accounted amongst the great tithes. *Deg. p.* 2. *c.* 1.— But this doth not alter the quality of the tithe: and the vicar's having received it, may be evidence of a grant thereof having been made subsequent to the endowment, although such original grant is now lost; but it is not evidence that wood in itself is a small tithe. (7)

Tithe of sylva cædua by the canon law.

3. By a constitution of archbishop *Winchelsea:* Tithes shall be paid of trees, if they be sold: Which Lindwood explains of large trees, which bear no fruit, and being cut down are not fit for timber, but are used for fuel.. *Lind.* 200.

And by a constitution of archbishop *Stratford:* Forasmuch as divers persons do refuse to pay tithes, which are notoriously due, of their *sylva cædua*, and of the wood thereof being felled, which things do not require so much labour as the fruits of the ground; and think that they lawfully refuse the same, because they have not paid tithes thereof in times past; and withal do render it doubtful what shall be deemed *sylva cædua:* We do therefore declare, that *sylva cædua* is that which, of whatsoever kind of trees it is, is kept on purpose and is mature and fit to be cut down, and which being cut down springs again from the stump or roots; and that the tithe ought to be paid thereof as a real and prædial tithe; and that the possessors of such woods [480] shall by all manner of ecclesiastical censures be compelled to pay the tithe thereof when cut down, as of hay and corn. *Lind.* 190.

By the statute law;

4. But, by the *statute* of the 45 *Ed.* 3. *c.* 3. it is enacted as fol-

(7) And it seems *de jure* a great tithe. *Reynolds* v. *Greene, Gwm.* 1573. 2 *Bulstr. R.* 27. But wood used as fuel by the farmer in his house of husbandry is a small tithe. *Lagden* v. *Flack,* 2 *Hagg. R.* 307.

[45 Ed. 3. c. 3.] loweth: At the complaint of the great men and the commons, shewing by their petition, that whereas they sell their *great wood* (8) *of the age of twenty years*, or of greater age, to merchants to their own profit, or in aid of the king in his wars, parsons and vicars of holy church do implead and draw the said merchants in the spiritual court for the tithes of the said wood in the name of this word called *sylva cædua*, whereby they cannot sell their woods to the very value, to the great damage of them and of the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time.

No tithe of wood for timber. [trees, and what are such trees.]

5. The wood intended in this statute is such as is fit for building of houses and ships; and therefore without doubt it comprehends oak, elm, and ash; but it hath also been adjudged to include beech as timber, in Buckinghamshire and some other counties, where better timber is not to be had, or is very scarce. (9) And those trees are free not only as to the trunk of timber, but also as to the bark, root, and *germins* that grew upon the ancient stock (1); and it is not material, how oft or how seldom the branches thereof are lopped, because being once free they are always free. 2 *Inst.* 643.

(8) *Gros bois* here signifies specially such wood as either hath been, or is, by the custom of the country, timber; and all such wood, if of the age of twenty years or more, is free from payment of tithes. 2 *Inst.* 642. *Fox* v. *Thexton*, 12 *Mod.* 524.

(9) Cherry, holly, aspen, horse-chesnut, lime, walnut, and willow-trees, are by the custom of the country in many places timber. *Mirehouse*, 77. and see *infra*, 488.

(1) For they were said to be parcel of the inheritance, and therefore not tithable. 2 *Inst.* 643. But this doctrine is now overturned as to *germins* growing from stools of trees entirely cut down; for there, no tree being left, the wood becomes an entire new wood. Great part of the underwoods of the kingdom are germins from such stools; and if not tithable, the clergy would be deprived of the tithe of many underwoods. *Walton* v. *Tryon*, *supra*. *Amler* v. *Jackson*, 3 *Wood's Dec.* 225. *Walbank* v. *Hayward*, 3 *Wood.* 512. This is now quite settled, from the opinion of Lord *Ellenb.* in *Ford* v. *Raester*, 4 *M. & S. R.* 130. The question was, whether oak wood of more than twenty years' standing, growing, not from acorns, but from old stools which belonged originally to trees which had stood more than twenty years, were so clearly entitled to an exemption by the statute, [illegible]

[illegible] requisite age; and could not therefore comprehend germins cut before the tree was statutably *gros bois*, nor the wood growing from the stool on which the *gros bois* once stood but stands no longer, or the germins springing from the root of what once was the root of *gros bois* but is so no longer.

And it hath been also resolved, that oak under twenty years, being fit for timber in time to come, shall not pay tithe; and that though it stands till it is rotten, and unfit not only for timber, but for all manner of uses, except the fire, it shall be privileged upon this general maxim, that once discharged and always discharged. 1 *Roll's Abr.* 640. [*Ram* v. *Paterson*, *Cro. El.* 477. *Brook* v. *Rogers*, *Moor. R.* 908.]

But in the case of *Buckle* and *Vanacre*, 1692. Upon a bill for tithe wood in Erith in Kent, about twenty years' growth, part used for timber, and part made into billets and faggots; it was resolved, that the last shall pay tithes: for the trees being above twenty years' growth alone will not privilege them, but the use. And the same resolution was in the case of *Acton* and *Smith*, which was reheard and reviewed; and of *Franklin* and *Jones*, in the year 1694; and also in the case of *Cowper* and *Layfield*, *Bunb.* 99.

And in the case of *Greenaway* and *The earl of Kent*, *H.* 1704; timber trees above twenty years' growth, cut and corded for fuel, and the bark stripped from the same, were adjudged to pay tithes, as well as underwood; but that no tithe was due for such wood above twenty years' growth, nor of the bark thereof, which was not corded. *Bunb.* 98. [481]

But, finally, in the case of *Walton* and *Lady Mary Tryon*, Dec. 15. 1751. (2) The plaintiff brought his bill, as rector of Mitcham, in Surry, for the tithe of the tops and lops of old pollard oaks, ashes, and elms; and of the tops, lops, and bodies of beeches.—Mr. Wilbraham argued for the plaintiff: The tithe of wood is certainly payable; and the law as to this is now pretty certain. The 45 *Ed.* 3. is an explanatory law; and all lops and tops are tithable if the tree be under twenty years' growth. Before the statute of *sylva cædua*, all were tithable; but by that law it is declared that all timber trees should be exempt: and the reason is plain; for timber trees yield but one profit, and that but once in a century; and therefore as it was so long before the owner had a profit, that wood was exempt. But even by this act it was not meant that the whole tree was exempt; the body only, not the tops and lops were so. Since this act, the courts have gone so far, as to exempt all parts of the tree: and even germins from these trees have also been determined to be exempt. After this, the courts endeavoured to bring it to some rule; and the buyers were always to pay the tithes. Afterwards, the courts held, that trees not converted to the use of timber were tithable; and on this some cases have been determined. As the case of *Man* and *Somerton*, 1 *Brownl.* 94. So the case of *Hawes* and *Cornwall*,

[Lops, tops, and cuttings of timber trees, are free from tithes.]

(2) *Gwill.* 827. And see *Brook* v. *Rogers*, *Cro. J.* 100, 1 *Roll. Abr.* 640.

1 *Lev.* 189.; where it is said, that wood, or fire-wood, though of twenty-five years' growth, shall pay tithe when felled. So in the case of *Rapley* and *Lloyd*, all wood for burning was held tithable. In the case of *Briggs* and *Martin*, *E.* 6 *W.*, a bill was brought by the plaintiff, as lessee of the rectory of Bromley, in Kent, for tithe wood made into bavings: The de-
[48[illegible]] fendants by their answer insisted, that old pollards and dotards paid no tithes; but notwithstanding this, the court decreed an account and satisfaction to the plaintiff for them. The courts seem to have gone a step further. They have had regard to the use made of the wood, and not to the age of the pollard: namely, what was used for timber, and what for fire-wood; the former
[482] was held to be exempt, the latter to pay tithes. And agreeable to this was the case of *Greenaway* and *The earl of Kent*, before the lord chief baron Ward. The bill was brought by the plaintiff as vicar of Walford, in Herefordshire. The defendant insisted, that no tithes were due of such wood as was above twenty years' growth. A cross bill was brought. And on hearing, the court declared, that the plaintiff was intitled to the tithe of all wood above twenty years' growth as well as under, which was corded, but not otherwise. But it may be objected, shall tithes be so uncertain, as to be determined by the use of them? I answer, that in many cases tithes must depend upon the use of them. As in wood, if it is made into bavings for firing, it is tithable; if to make fences, it is not so. So if one fats cattle on land, agistment is due for them; so if he keeps cattle as barren, tithes are paid: but cattle kept for the plough are exempt, and even those reared for the plough are exempt. These are all established cases, and do not want any confirmation. The case of *Brook* and *Rogers*, *Moor*. 908., is very express, that if timber is lopped before twenty years' growth, tithes should be paid of the loppings. And if these trees in question have been constantly cut, and tithes have been paid of them without any contradiction (as now is in proof), why is this not an evidence that these trees were cut before twenty years' growth, and so out of the statute of *sylva cædua?* And this presumption may more naturally arise in this case, for the falls here happen but once in sixteen or twenty years; and one of the plaintiff's witnesses speaks to tithes being paid of these trees forty-five years ago without any molestation whatsoever; and there is not one witness produced for the defendant, who will venture to swear, that every one load of timber was cut without paying tithes: and if that be the case, the natural presumption is, that this wood is tithable: for it has paid tithes, as long as memory can go back. As to the *beech;* if it be timber, as insisted upon by the defendant, then it comes within the statute of *sylva cædua:* and this matter must be tried, if the parties think it worth their while to dispute it. —— By

Mr. Solictor-general for the defendant: The question now put is, whether the tops and lops cut from trees above twenty years' growth are liable to pay tithe if cut in order to be used as fuel. And this is a question of a very extraordinary nature indeed, and contrary to both old and modern law. For no point was ever laid down more clearly, from the time of Edward the third to the present time, than this, that tops and lops of [483] trees above twenty years' growth are always exempt: and the reason is, when once it is privileged, it always remains so. The case in *Moor*. 908., cited for the plaintiff, is expressly for the defendant; for that particularly states, that if not cut within the twenty years, then it is exempt. And so have been abundance of other cases. And how can the right of the parson arise from [484] the *use* of the thing? How is it possible for the parson to know the owner's intent? The right therefore ought to commence from the time it is cut and severed. The earl of *Kent*'s case does not prove the present distinction. For that proves, that the trees themselves were in question; and nothing at all was said of the lops and tops. Besides, they were not pollards or dotards, but young oaks. This proves that all trees cut down and used for fire would be liable to tithes. But this proves too much. But there is a note on the back of Mr. Brown's brief in that cause (which I have), that settles what this case was: He says there was positive evidence, that the trees corded had grown from stems of old wood, and was formerly coppice-wood; and this will alter the case greatly. The case of *Layfield* and *Cowper*, *T.* 1698, was on a bill for tithes of lops and tops of timber trees; the defendant insisted, that they were the product of beech and ash trees; he admitted, he did convert them to fuel and cordwood; but, in regard that they were above twenty years' growth, insisted, that they were exempt: By the decree, an account was directed for wood in general; and exceptions were taken to the remembrancer's report, that he had taken no notice that these beeches were some thirty, some fifty year's growth, and were timber, and therefore exempt: and of that opinion was the court. In the case of *Bibey* and *Hurley*, *H.* 1721, the bill was for tithe of coppice and other wood: The defendant insisted, that he had felled several timber trees of twenty years and upwards, and had dug up several roots, and made them into stacks, and made the tops into faggots: some were used for repairs, others for fuel; and as these were all above the age of twenty years, the body with all the rest are exempt from paying tithes by law: and it was decreed, that the plaintiff should have an account of the tithe wood, except for the tithe of oak, ash, and maiden trees of beech proceeding from stools above twenty years' growth: The application thereof to *fuel*, does not make the difference. But it is objected, that it must be presumed these trees now in

question were cut before twenty years' growth; and therefore never had the privilege: But as that is not charged by the bill, it cannot be presumed. As to the beech, if insisted on, it must be tried.——By the lord chancellor *Hardwicke*; The tithes demanded by the bill are of two sorts; first, tops and lops of old pollard oaks, ashes, and elms; secondly, beech trees, both body and branches. The principal question arises on the tops and lops of old pollard oaks, and the rest. There is no difference in point of fact. It is admitted on both sides, that there is no coppice-wood in this ground; that they are ancient pollards; and as to the beeches, that they are of twenty years' growth and upwards, and the greatest part of them was cut and made into billets and sold for fire, except a small part of them which was used for posts and rails. The plaintiff has proved, that at two former falls, tithes were set out and taken of this wood, the one in 1712, the other in 1728. On the other hand, the defendant has not proved any fall when tithe was not paid; but has proved, that in these two falls the family lived in Northamptonshire, and knew nothing of their being set out and taken, and that no other wood in the parish does pay tithe, or ever had paid. The plaintiff has founded his right on this; namely, the *use* and application of the things of which tithe is demanded: But though this be the general right set forth in the bill; yet if any other right appears, the plaintiff will be intitled to an account. This is a question of very great consequence, both to the owners of wood, and to the clergy also; and has been argued, both from reason and authorities. And upon the reason of the thing, it has been said, that there is no more reason why tithes should not be paid of wood, than of any other product of the earth, for it *annuatim renovat*. But this proves too much; for according to this reasoning, all wood in general would be liable; and though this does *annuatim crescere*, yet it does not *annuatim renovare*: at common law coppice-wood is subject to tithes, though it does not
[384] *annuatim renovare*; yet in its nature it ought to pay; for it is cut under a certain course of years, and is looked upon as an ordinary stated renewal, like the case of saffron: but of timber trees the stated rule is otherwise: there the law does not wait for a stated course of felling. It was further reasoned for the plaintiff, that the lops and tops of pollards are tenancy profits: But this is no rule of tithes; and varies in different counties; and would make the affair of tithes very uncertain; and in many places the lops of spiral trees are allowed to tenants for fire-wood, and yet such
[485] lops are not tithable. It was further said to be reasonable, that the *use* and application should determine whether the thing was tithable or not; that as a coppice is liable, so it is reasonable that any other wood, not timber, but used for fuel, should be so too: But this goes to the question put in issue by the bill, and I

am afraid would be a very dangerous innovation: the subsequent use of the thing, as it does not alter the nature, cannot give a tithable quality which it had not before; if it could, why not *vice versa*? that is to say, if wood not timber should be applied to the use of timber, why should not such use exempt it from the payment of tithes? This was never heard of, yet it is equally reasonable. It is said, there are certain cases, where the use and application of the thing shall make it tithable; and there will appear no greater uncertainty in one case than in the other; as for instance, wood cut to be burned in the house of a parishioner, this was said to be not tithable: but that is not true, unless by custom; for it was otherwise determined in the case of *Norton* and *Fermer*, *Cro. Cha.* 119. It was said also, that cattle for the plough and pail are not tithable: so there the use determines: but this is not a prædial, but a mixt tithe, which the parishioner is not obliged to set out at a particular place or time; and the parson receives it in another manner by taking the tenth part of the profits. In many cases it is impossible to say, to what uses the wood may be applied: the owner may sell it standing, the buyer to cut it; and if so, how is the intention to be known? And in many counties where timber is very plentiful, there it is often cut down and used as fuel; and if the use and application was to prevail, it would make two different common laws of tithe, and this without any custom. The law for tithes of wood is a positive law; to wit, that of all timber trees of 20 years' growth or upwards, whether timber by law or custom, no tithe is to be paid, either of bodies, lops, or tops. It has been much controverted, whether the statute of *sylva cædua* is a new law, or only declaratory of the common law: the latter is now the settled opinion; for the words of the statute are, *it hath been used of old*. In the statute, the wood is particularly mentioned, and its age and growth: but not one word is said of the use; and the opinion of all the courts upon the construction of this statute has been, that where the tree is timber, by law or custom, of 20 years' growth or upwards, it is [486] exempt. And in 2 *Inst.* 642, 643., the rules are very particularly laid down. These rules have not been contradicted, except in the case of germins that came from old stools, and which is the case of most coppices in England. But it is asked, what difference is there, if germins grow from trees entirely cut down, or from trees that have been lopped? I answer, that the difference is great; for in the case of germins that come from stools, no tree remains from whence the privilege is derived; but in the case of lops and tops, the tree remains, and so does the privilege. I come now to consider the *case* cited against this doctrine by the counsel for the plaintiff. The case of *Man* and *Somerton*, 1 *Brownl.* 94., is not applicable to the present case. The case of *Hawes* and *Cornwall*, 1 *Lev.* 189., is this; "Wood cut for firing,

"though above 20 years' growth, shall pay tithes; and so pol- "lards of above 50 years:" But this is very short and imperfectly stated, and is not supported by law at all; and by report of the same case in 1 *Sid.* it is said, that the wood was coppice-wood; and by the determination, most probably it was so, and therefore proves nothing for the plaintiff. But it is said, there is no difference between pollards and underwood, for pollards are not timber; but I answer, that pollards having gained this privilege always retain it; and the bodies of pollards may serve to many uses as timber doth; and if dotard trees are privileged, much more ought pollards. The next case cited was that of *Briggs* and *Martin*, which was on a bill for lops and tops of old pollard and dotard trees, and an account was accordingly directed: But on what this was founded does not appear, nor whether these pollards were under the time of privilege or not; and what makes this case the more extraordinary is, the decree in the case of *Northley* and *Colbe* in the very next term, and it is directly contrary; and the only way of reconciling these two cases is, that in the first case it must have appeared that the pollards were cut before 20 years' growth. *Greenaway* and *The earl of Kent* was the next case, and most principally relied on; and the ground of this decree was, that all wood, even above 20 years, that was cut and corded, should be tithable; and goes further than any case before or since: but the lord chief baron Ward in that case was of a quite different opinion, and made a learned argument against the decree; but the other three barons
[487] differed from him: therefore I observe, this was not a uniform authority; and I think the chief baron Ward's was the best opinion: baron Price's reasons in that cause do not satisfy me at all; when he was considering the statute of *sylva cædua*, he said, that ancient statutes must be construed according to the intent, and not literally; and that *great wood* does not in its strict sense mean trees of this sort, but such wood as is applicable to large buildings; which is in effect to say, that a tree which in its nature is timber, yet if it is not large, and is applied to firing, shall be tithable: another ground that he went upon was, the statutes relating to the rules of felling of wood; but these are rules laid down only for the preservation of timber, and cannot be applicable to tithes that are demanded of them: and upon the whole, this determination is directly contrary to all the other authorities; for there is a *tempus constitutum*, and that cannot be departed from; and I will say further, that there has been no precedent since to follow it; for as to that case of *Bibey* and *Huxley*, that is rather against it. If these trees now in question were lopped and made pollards before 20 years' growth, and so have continued to be lopped, then they will be liable to tithes: But this is a question of fact proper to be tried, being too much for me to determine upon the

evidence now laid before the court: I am rather inclined to think that they were not, for the plaintiff himself in his bill has stated them to be ancient pollards and large. The second question relates to the tithes of *beeches*, both bodies and branches: and it is not disputed, but that this wood is above 20 years' growth: and then the matter of fact must be tried, whether it is timber by the custom of the country: And if so it will be exempt; otherwise it must pay tithes. (*h*)

[After all, it must needs be difficult oftentimes precisely to determine the age of oaks, ashes, and other trees; which spring frequently from seeds shed upon the ground, of which no account is, or can be, kept by the owner or any other. In many places where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree: and if it is 24 inches in circumference, it is deemed of 20 years' [488] growth; if under that measure, it is accounted underwood.]

But only of wood not fit for timber.

6. Of wood not fit for timber, tithes shall be paid. As of hazel, birch, willow, [sallow,] white thorn, holly, alder, maple, asp, *hornbeam* (3), and such other like trees of base and inferior nature, and unfit for buildings: of these tithes shall be paid, though they be above 20 years' growth. 1 *Roll's Abr.* 640.

Yet the scarcity of other timber (as hath been said) and custom of the country to put such trees to the uses of good timber, may free them, being of twenty years' growth or under, from payment of tithes; as hath particularly been adjudged of [beech,] asp, cherry-tree, and other like trees, in Buckinghamshire: so of willows in the county of Southampton. See *ante*, 480. *n.* [[illegible]]

Wood growing in hedgerows is not exempt by the custom of a parish from tithes. *Mantill* v. *Paine*, 4 *Gwill.* 1504.

No tithe of the roots of trees.

7. And if a man cut down a coppice wood, and thereof pay his tithes, and afterwards before any new branches spring out, he grubbeth up the roots and stubbs of the wood, he shall not pay tithes thereof; for that they are parcel of the frank tenement, and not annually renewing. 1 *Roll's Abr.* 637.

Nor of wood for husbandry or fuel.

8. Also trees cut only for mounds, plough gear, hedging, fencing (4), fuel, maintenance of the plough or pail, are not tithable. 2 *Inst.* 655. [*Gould. R.* 93.]

(*h*) S. C. *Amb.* 130.; where it is said that the oak pollards were 200 years old, and that the court afterwards, at the desire of the plaintiff, directed issues. These, according to the opinion of Lord *Hardwicke*, seem to have been — 1. Whether the oak and ash pollards were lopped before they were twenty years old. — 2. Whether, time out of mind in the parish of Mickleham, beech has been deemed timber.

(3) But in *Harbert's* case, 3 *Rep.* 12. 2 *Inst.* 642. this opinion of *Plowden*, in *Soley* v. *Molins*, *Plowd. R.* 420. was held not to be law.

(4) *East* v. *Harding*, *Cro. Eliz.* 499. *Croucher* v. *Collins*, 1 *Saund. R.* 143. 2 *Inst.* 652. *Hetley*, *R.* 88. *Anon.* 1 *Vent. R.* 75. *Wats. Cl. L.* 546.

But this is to be alleged, not absolutely, that by the law of the land, wood so applied shall not pay tithe: but *sub modo*; that is, that the parson hath some consideration for it, or at least that the house is for maintenance of husbandry, by reason of which the parson hath more plentiful tithes. By which rule, if a man hath an house of husbandry with lands, and demising the lands, yet serveth the house; tithe of fire-wood is payable. *Gibs.* 686.

Nor for hurdles of sheep.

9. For osiers employed in hurdles for sheep, no tithe shall be paid. *Gibs.* 684.

Nor for hop-poles.

10. If wood be cut to make hop-poles, and so employed, no tithes are due, where the parson or vicar hath tithe hops. *Bunb.* 20.

For making bricks.

11. If a man cut down wood, and burneth it to make brick for the reparation of his house within the parish, for the habitation of himself and his family; no tithes shall be paid for this; inasmuch as the parson hath the benefit of the labour of his family. 1 *Roll's Abr.* 645. [*Thornhill's* case, *Hetl. R.* 93.]

But if a man cut down wood and burn it to make bricks for the enlargement of his house within the parish, more than is necessary for his family, as for his pleasure and delight, he shall [489] pay tithes for this. Accordingly, where the plaintiff in prohibition had affirmed, that he burned it for the reparation and enlargement of his house, generally, without saying for the necessary habitation of his family, a consultation was awarded; for the court said, that by this surmise he might build a castle, and yet pay no tithes. 1 *Roll's Abr.* 645.

[The subsequent use of the article of wood seems in these instances to determine its liability to be tithed: a proposition calculated to produce great confusion in the law of tithes. (See *per* lord *Hardwicke* in *Walton* v. *Tryon*, ante, 485.) And perhaps these discharges from payment of tithes in consequence of the subsequent use, can only be claimed on the principle of special custom operating by way of exemption in respect of some satisfaction to the tithe owner, which it lies on the parishioner to shew. (5) A *custom* to be discharged of the tithes of wood used in husbandry houses, or repairing fences on the premises, may undoubtedly be good. (6) But in *Lagden* v. *Flack* (7) it is said that any custom of exempting wood used as fuel by the farmer in his house of husbandry from tithe (which is a small tithe), is *strictissimi juris*, and requires to be established on the fullest evidence.]

Fruit-trees.

12. If a man pay tithes for the fruits of trees, and afterwards cut down the same trees, and maketh them into billets or faggots them; he shall not pay tithes for the billets or

(5) *Norton* v. *Fermer*, *Cro. Car.* 118.
(6) *Waterman* v. *Jones*, 1 *Wood's D.* 468.
(7) 2 *Hagg. R.* 307.

gels; for that this is not a new increase. [Baxter v. Hinks,] 2 Inst. 621. 1 Roll's Abr. 641, (i)

13. Concerning nurseries, or trees transplanted, it hath been resolved, that where the owner dug them up, and made profit of them, and sold them in another parish, tithe should be paid thereof: and if the owner sells them, and pulls them up himself, the owner shall pay the tithes; but if he sell them particularly to another, the vendee shall pay the tithes. Gibs. 683, 684. God. 431. Nurseries.

14. When wood is tithable, it is set out while standing, by the tenth acre, pole, or perch; or when cut down, by the tenth faggot or billet, as the custom hath been. Wood. b. 2. c. 2. Or, if there be no custom, then the general rule seemeth to be, so soon as the tenth can be severed from the nine parts. In what manner to be paid.

Where a wood is cut, consisting of the loppings of great trees, and of underwood, and the proportion on one side or the other side is so small, as not to quit the charge of separating; it is said, that the whole shall pay tithe or be discharged, according as the greatest part is tithable or not tithable. Gibs. 667.

But this can only be an argument of convenience; and cannot in any respect alter the nature of the tithe.

15. Of underwoods sold standing, the tithe shall be paid, not by the seller, but by the buyer. God. 455. Deg. p. 2. c. 4. By whom to be paid.

But if a man sell wood to another, and the vendee burneth it in his house: in this case, it is said, that the vender shall be charged for the tithes, and not the vendee; for that no tithes are due for wood burned in one's house. By the civil law, it is said, that the parson hath election to sue either of them: but this is against the common law. 1 Roll's Abr. 656. [490]

[In short, the matter seemeth to be plainly this: That he shall pay tithe, to whom the other nine parts belong when the tithe becomes due.]

16. A prescription by one, to pay but three farthings for the tithe of all willows cut down by him in such a parish, was declared to be ill; because if he cut down all the willows of other men too, only three farthings should be paid for all: but to have prescribed for all willows cut down upon his own land, would have been good. God. 60. Modus.

It is a custom in some places, to give an hearth-penny for estovers burnt; by which they are free from the tithe of wood burnt for fuel. Boh. 57. (8)

(i) [But tithe is due as well from those trees which yield tithe fruit as from those which do not.] See Grant v. Hedding and Hardr. 380. and Eq. Ca. Ab. 366. [Gwm. 515.]; by which authorities it does not appear to be material whether the trees were sold and transplanted in the same parish or another.

(8) See Mirehouse on Tithes, 82.

V. *Flax and hemp.*

Flax hath been adjudged to be small tithe; and so to continue, notwithstanding its being sown in large fields. *Gibs.* 680.

Concerning which, by the 11 & 12 *W. c.* 16. [continued 6 *A. c.*28. made perpetual, 1 *G.* 1. *st.*2. *c.*26. § 2.] it is enacted as followeth: Whereas the sowing of *hemp* and *flax* is and would be exceeding beneficial to England, by reason of the multitude of people that are and would be employed in the manufacturing of those two materials, and therefore do justly deserve great encouragement; and whereas the manner of tithing hemp and flax is exceeding difficult, creating thereby chargeable and vexatious suits and animosities between parsons, vicars, impropriators, and their parishioners: for remedy whereof it is enacted, that every person who shall sow any hemp or flax shall pay to the parson, vicar, or impropriator, yearly, the sum of five shillings and no more, for each acre of hemp and flax so sown, before the same be carried off the ground, and so proportionably for more or less ground so sown; for the recovery of which sum or sums, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of this land. § 1.

Provided, that this shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or otherwise discharged of tithes by law. § 2.

VI. *Madder.*

By the same rule that the tithe which proceeds from things
[491] newly introduced into England hath been adjudged to be a small tithe, the tithe of madder may be deemed also a small tithe.

Concerning which, by the 31 *G.*2. *c.* 12. (which was in force for fourteen years, and by the 5 *G.* 3. *c.* 18. is continued for fourteen years further,) it is enacted as followeth: Whereas madder is an ingredient essentially necessary in dyeing and in calico printing, and of great consequence to the trade and manufactures of this kingdom, and may be raised therein equal in goodness, if not superior, to any foreign madder; therefore, for the encouragement of the growth thereof, it is enacted, that every person who shall plant, grow, raise, or cultivate any madder, shall pay to the parson, vicar, curate, or impropriator of the parish or place, the sum of five shillings an acre and no more, and so proportionably, in lieu of all manner of tithe of madder; for the recovery whereof, the parson, vicar, or impropriator, shall have the common and usual remedy allowed of by the laws of this realm. § 1.

Provided, that no madder shall be carried off the ground on

which it grows, before payment of the said sum herein directed in lieu of tithes. § 2.

Provided also, that this shall not extend to charge any lands discharged by any *modus decimandi*, ancient composition, or other discharge of tithes by law. § 3. [Expired.]

VII. *Hops.*

Hops pay a prædial tithe; and regularly are accounted among small tithes. *God.* 414.

Thus in the case of *Franklyn* and *The master and brethren of St. Cross*, *T.* 1721; the vicar being endowed of small tithes, it was decreed, that he was thereby intitled to hops, being a small tithe, though of growth since the endowment. *Bunb.* 79.

Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth measure. *Bunb.* 20. (*k*)

In a late case (*l*), Mr. Chandler, planter at Maidstone in Kent, [492] having set forth the tithe of his hops by the tenth pole unpicked, Mr. Bliss the impropriator brought this matter before the court of exchequer; where, after long debate of counsel on both sides, and reading three former decrees, the court again declared this method of setting forth to be illegal.

And, finally, in the case of *Walton* and *Tyers*, May 17. 1753. Mr. Tyers having planted a considerable number of acres with hops in the parishes of Mickleham and Darking in Surrey, of both which parishes Mr. Walton was incumbent, offered to pay him after the rate of 20*l.* an acre for the tithe thereof; which Mr. Walton refused. Whereupon Mr. Tyers gave him notice, that on such a day he would begin to gather his hops, and would [493] regularly set out every tenth hill through all his hop plantations as the tithe thereof, by severing the bind of the hops from the soil, and leaving the same on the poles; and that he would in the same manner daily set out the tithe of his hops, in order that Mr. Walton's agent might be present at the respective times of

(*k*) *Bliss* v. *Chandler*, 2 *Wood's D.* 116. *Sledman* v. *Lye*, 1 *Ld. Raym.* 504. 1 *Roll. Ab.* 644.

It has been held — 1. That where the parson had tithe hops, [and tithe of *sylva cædua*,] no tithes should be paid for the poles which were used in the hop-yard [because the tithe of the hops is increased by the use of the poles]; and a question arising, whether the parson should have tithes of the bark of the poles, the bark being sold; by *Lechmere*, he should: but the chief baron and the other barons *e contra*, for the poles being privileged, the bark shall be so too. *Bate* v. *Spacking*, *Bunb.* 20. [2 *Wood's Dec.* 87.] 2. That for fuel spent in fire to dry hops, tithes should be paid; because the parson had no benefit by that, the tithes being paid before they were dried. 1 *Freem.* 334.

(*l*) *Anno* 1720, according to Mr. Rayner. *Introd.* xxv.

setting out the tithe, and might carry away the same in due time. Mr. Walton said, that this method of tithing was new and contrary to law, and that he would not take the tithe in that manner; but that he expected the whole crop should be gathered, and afterwards measured in baskets, and that every tenth basket of hops, after being so measured, should be set out for the tithe thereof. This Mr. Tyers refused to do, and proceeded according to his notice to set out the tithe in the manner above mentioned; leaving every tenth hill ungathered, having cut or severed from the soil the binds or stems on which the hops on every such tenth
[[illegible]] hill grew; and renewed his notice daily whilst his hop-gathering continued. Mr. Walton did not meddle with the tithe so set out; and after the hops had continued for some months upon the poles on every tenth hill as aforesaid ungathered, and so became spoiled and rotted, Mr. Tyers brought an action for
[493] damages against Mr. Walton, forasmuch as he was thereby hindered from dressing and cultivating his hop plantations. Upon this, Mr Walton filed his bill in the exchequer against Mr. Tyers, thereby insisting, that the manner in which Mr. Tyers had set out the tithe of his hops, by leaving the hops on every tenth hill, and severing the binds from the soil, was not a proper method for setting out such tithes; but that the tithe of hops ought by law to be set out after the same are picked from the bind or stem. And, on hearing, the court declared, that the method of tithing hops insisted on by the defendant in his answer, is not a good setting out of the tithe of hops; but that hops ought to be picked and gathered from the binds, before they are tithable. Mr. Tyers appealed to the house of lords; setting forth, that the manner of setting out the tithes by the admeasurement of the hops in baskets would be very prejudicial and inconvenient to both parties, as the hops by that means would be necessarily bruised, the flower and condition thereof hurt, and the hops thereby very much damaged; that it hath been usual of late years, for hop planters to direct their gatherers to pick or assort their hops into different pokes, according to their different degrees of fineness and colour, to wit, the *fine* and the *brown*; and such assortment is the most material and expensive part of the manufacturing of hops, thrice as much time and expence being required in picking and assorting hops into two different parcels, as is necessary in picking them into one poke when first gathered; and that it is unreasonable, that persons claiming tithes should have the benefit of this part of the manufacture of hops, which costs about 5*l.* an acre, without making any allowance, or contributing any share to the expence; and praying relief, for these (amongst other reasons): First, There is no positive law, to regulate the manner of tithing hops; neither is it fixed by immemorial usage or custom; the determinations of courts relating thereto have been various; and

therefore that manner of tithing seems most just and equitable, which is both the least prejudicial to the owner, and most beneficial to the parson or impropriator. Secondly, The manner insisted on by the respondent, by picking and then setting out the tithes by admeasurement in baskets, is so very detrimental to the planter, that it must inevitably be the ruin of the plantation of hops, the cultivation whereof is of extensive benefit to this kingdom: The method insisted on by the appellant is undeniably fair and equitable, not liable to any fraud whatsoever; whereas the method insisted on by the respondent is avowedly oppressive and injurious, in no wise productive of any benefit, or preventive [494] of any fraud. —— Mr. Walton, the respondent, hoped the decree would be affirmed, (amongst other reasons) for these following: First, The setting out the tithe of hops by measure after they are picked from the bind or stem, is the fairest and most equal method, and liable to the least inconvenience; whereas the method of tithing contended for by the appellant, by every tenth hill, would be liable to great fraud, inasmuch as the planter of hops would have a right to set out for tithe every tenth hill to be computed from the place he began at, and he might any year determine before he manured his hop ground where he would begin to set out the tithe, and thereby would certainly know every tenth hill through the whole plantation, and might neglect to manure or improve them so much as the other hills, which would be unjust and unreasonable. Secondly, The method of tithing contended for by the appellant, would give occasion to many disputes and controversies; as the hops growing on one hill are apt naturally to intermix with the hops growing on the hills adjoining, so that it is scarce possible to sever the one from the other intire; and the owner of tithes, or his agents or servants, exercising the right of entering into the hop grounds, and pulling up the planter's poles, must frequently furnish matter for suits and vexations, which would be inconvenient both to the owner of the tithes and the parishioners. Thirdly, The appellant hath not made the least proof, that the tithe of hops was ever set out before they were picked from the bind or stem, or that they were tithed by the tenth hill (which is the method of tithing he contends for); but on the contrary, in many instances, where the method of setting out the tithe hops has been disputed or brought in question, it has been uniformly determined and adjudged, after solemn argument, that the tithe of hops by law ought to be set out by measure, after they are picked from the bind or stem. And the decree was affirmed by the lords. (m)

[In the case of *Knight* v. *Halsey*, the court of K. B. held, that *no usage* can vary the rule, that the tithe of hops must be set

(m) 5 *Bro. P. C.* 99.

forth *after* they are picked from the bind: for the cultivation of hops was introduced within the time of legal memory, and consequently a contrary custom [*e. g.* to set out the tithes by the tenth row, or by the tenth hill where the rows are unequal, leaving the binds uncut, and the poles standing,] cannot be supported. The judgment was affirmed on appeal to the house of lords. 7 *Term Rep.* 86. 2 *Bos. & Pul.* 172. 8 *Bro. P. C.* (ed. *Tomlins*) 235. See 1 *Campb. C. N. P.* 308.]

There can be no modus for tithe hops, because the court will take notice, that hops have not been ancient, but used in beer of late times only, being first introduced into England about the year 1524. (9) Yet a prescription to pay so much in lieu of all small tithes, may include hops and other such small things which have come in use of late years. *Wats. c.* 49. *Bunb.* 20. (1)

[495] VIII. *Roots and garden herbs and seeds; as turnips, parsley, cabbage, saffron, and such like.*

[Garden herbs and plants.] Out of gardens is paid tithe of all garden herbs and plants: as *parsley, sage, cabbage, turnips, saffron,* and the like; which are small tithes, and may be demanded in kind. *Bunb.* 10.

[Potatoes.] So *potatoes* are a small tithe; and, consequently, due to the vicar, where he is endowed of the small tithes: and when gathered, the tenth part must be set out.

[Turnips.] So also *turnips* (2), which, when pulled, ought to pay tithes, though never so often sowed, and though upon the same land. As in the case of *Benson,* impropriator of Bromley St. Leonard, Midddlesex, against *Watkins and others, H.* 3 *G.* The court declared the tithe of turnips to be due *toties quoties,* though severed never so often in the same year.

M. 6 *G.* *Crow,* tenant under the church of Rochester of the tithes in the hamlet of Modingham in the parish of Chippinhurst in Kent, against *Stoddart.* The court declared that tithe of turnips sowed after corn, and eaten by unprofitable cattle, to be due; though it was urged to be an improvement of the land, and that the parson has the benefit of it the next year. (3)

(9) *Chapman* v. *Smith, Gwm.* 851. 2 *Ves.* 506. *Crouch* v. *Risden,* 1 *Sid.* 443. *Gee* v. *Pearch,* 1 *Wood. Dec.* 386. But see 7 *T. Rep.* 88.

(1) Hops and clover. *Green* v. *Austen, Lutw.* 1071.

(2) The words "gardens, curtilages, and altarage" in an endowment, will not give the vicar the tithe of *potatoes* and *turnips,* or of any other article not known in England at the time; but where there has been a general perception of all small tithes by the vicar, a subsequent endowment will be presumed of small tithes of every sort, for usage is the broad ground of presumption in favour of the vicar's endowment. *Williams* v. *Price and others,* 4 *Pri. R.* 156. And see *per Graham* B. 2 *Pri. R.* 450.

(3) *Bordley* v. *Tims, Gwm.* 540. *Hall* v. *Filtz, Gwm.* 606.

T. 9 G. *Harwood*, vicar of Erith in Kent, against *Railston*. The court declared tithe to be due of turnips sowed after corn in the same year, and fed upon on the land by barren cattle.

So in the case of *Swinfen* and *Digby*, *H.* 1731; it was declared by the court, that where land is sown with turnips after the corn is cleared, and fed with sheep and barren cattle, tithes shall be paid of such turnips; although in this case it was insisted upon for the defendant, that the soil in that county, to wit, in Staffordshire, is dry and sandy, and that this method of husbandry improveth the land, so that the plaintiff had thereby better tithes of corn, and had before received the tithes of lambs and wool of the sheep so fed: But the court overruled this defence, and said it amounted to a *non decimando* as to turnips. *Bunb.* 314.

That is to say, if the cattle are fed upon the turnips unsevered from the ground, an agistment tithe shall be paid for such cattle: But if the turnips are severed from the ground, then the tithe in kind of such turnips shall be due from the severance. (*n*) [496]

[Setting out tithe of potatoes and turnips.]

[Tithe of *potatoes* and *turnips* should be set out in any state in which the tithe owner can arrive at a fair comparison of his proportion. As the occupier is not obliged to bestow more labour than the nature of the thing requires for the tithe owner's benefit (4): if the farmer does not put them into heaps for himself, it *might* be held that he need not do so for the tithe owner (4); but it seems the fairest way to set them out in heaps of equal size on the spot where they are dug, and not by ridges, furrows, or tenth roots, which may be unequal. The occupier is not allowed to bring them home, and there measure them for the tithe owner. (5)]

Action on the case against the parson for not taking away the tithe of *turnips* after they had been set out. The turnips had been drawn *to feed cattle*, and every tenth turnip was thrown aside, as drawn, on a ridge opposite for the parson. The question was, whether the tithes were properly set out? The parson contended that the turnips ought to be set out in heaps, or at least gathered into heaps for him. A motion was made for a new trial; and it was held, that if the farmer put them into heaps for himself, he should do so for the parson; but if he did not do so for himself, he need not do so for the parson. The rule of

(*n*) *Eathard* v. *Brown*, *Dowsing*, *and others*, in the exchequer, *Hil.* 9 *W.* 3. *ex. Reg. Lib.* The defendant Dowsing admitted that he had several roods of turnips; but said, that he sold none, but fed his cattle therewith, and that the plaintiff ought not to have tithes for the same; that he had tithes of calves, and other tithes of cattle. But the court decreed an account of the tithes of the turnips severed and drawn. [See *ante*, 475.]

(4) *Newman* v. *Morgan*, 10 *East*, 11, 12. *Blaney* v. *Whitaker*, *ibid.*
(5) *Beaumont* v. *Shilcot*, *Gwm.* 915. See *id.* 1101.

law was, that things should be tithed as soon as they were in a proper state to be tithed. The same was the case with hay and corn. Rule for a new trial was discharged. (6)

[Tobacco.] If *tobacco* be planted here, the tithes thereof are small tithes. *Godb.* 366.

[Saffron.] *Saffron* also is tithable, though gathered but once in three years. *Wood. b.* 2. *c.* 2.

And it is a prædial small tithe: for where the parson had the great tithes, and the vicar the small, and a land which had been sown with corn was sown with saffron, the tithe was adjudged to the vicar as a small tithe, notwithstanding the statute of the 2 *Ed.* 6. *c.* 13. that tithes shall be paid in such manner as they have been for forty years past. *Gibs.* 685.

[496 *a*] [Fruits and flowers in general.] [To these may be added all fruits and flowers; under which head, besides the above, may be enumerated *onions*, *cabbages*, *carrots*, *annis*, *mint*, *rue*, *apples*, *gooseberries*, *pears*, *plums*, *cherries*, *currants*, *lily flowers*, &c.; all of which are small tithes, and demandable in kind even where gathered by some other person than the owner, unless stolen. (7)

[Seeds.] All *seeds* are small tithes: thus when clover stands for seed, and is not made into hay, the seed is small tithe. *Rape*, *carraway*, *turnip*, and *mustard* seed, are small tithes; but if the herb is growing with other grass, and made into hay, it would be great tithe. (8) In *Filewood* v. *Kemp*, and *Same* v. *Burleigh* (9), it was held that the tithe of a crop of *carrot* seed sold, might be demanded of the vendor or vendee at the clergyman's option, and that the expence of rubbing it out must be deducted from the value at the time the crop is cut: but the small tithe of seeds is only payable when no tithe is taken of the herbs or plants themselves. (1)

[Hot-house plants.] The question, whether *pine apples*, *grapes*, *melons*, and *hot-house plants* in general, are tithable or not, was argued in *Dom. Proc.* in *Adams* v. *Waller* (2), which ultimately went off on another point. It was then argued *against* the tithe by *Macdonald*, *Kenyon*, and *Selwyn*, that the produce of a hot-house is not the producė of the soil and climate; and that pots in a house sallad raised on a flannel would be *eâdem ratione* tithable. *For* the tithe it was observed by *Mansfield*, that every thing raised in a garden is principally in consequence of manure and labour, and

(6) *Blaney* v. *Whitaker*, *M.* 23 *G.* 3., cited 10 *East*, 12.

(7) *Hetl. R.* 100. and *Mirchouse*, 61, 62., *infra*, *IX.* 1.

(8) *Wallis* v. *Pain and Underhill*, 2 *Com. R.* 633. *Pomfret* v. *Lauder*, *Bunb. R.* 344. *Gwm.* 530. See *ante*, *II.* 4.

(9) 1 *Hagg. Rep.* 489, 490.

(1) *Com. Dig.* tit. *Dismes* (H. 10.).

(2) *Gwm.* 1204. 4 *Wood's Dec.* 159.; called *Hewit* v. *Adams*, 7 *Bro. P. C.* 63. (*Tomlin's ed.*) See 3 *Rayner*, 965. *et seq.*

yet tithable; that *cucumbers* were never objected to; that *cherries*, *walnuts*, *cabbages*, and *potatoes*, are all exotics; that the expence could be no objection, as it would have excluded cabbages and most other things, and that hereafter the raising pines may cease to be expensive. In the judgment in this case in the exchequer, *Skynner* C. B. said, "As to melons, pines, &c. I know not how to draw any line between them and other produce of gardens. What is the tithe of gardens? It is prædial. The notion of artificial heat and soil would exclude almost all the produce of gardens: things raised under glasses are raised in an artificial soil, but must all be subject to the same rule. Inoculation, to be sure, is a work of art; but art and expence used will not make any difference." So *Eyre* B. added, "Hot-house plants are certainly not exempt. The like hardships occurred in wastes, madder, &c.; but an act of parliament was necessary to exclude the right of the parson. The general rule is clear, and the inconveniences attending it are not great: mutual inconveniences will suggest mutual moderation; and if not, a court of justice cannot help it." Hence the produce of hot-houses, like that of gardens, is *de jure* tithable. (3)]

[Customary payment.] Most commonly, a certain consideration in money is paid in lieu of the tithes of gardens, either by custom, or by agreement with the parson. If the custom be a parochial custom, or extending to gardens throughout the parish; the enlargement of a garden doth not make tithe due in specie: but otherwise, if it is a special prescription for this or that garden. And the same thing is to be said of orchards. Accordingly, in the forementioned case of *Franklyn* and *The master and brethren of St. Cross*, it was decreed by the court, that a penny for gardens and orchards can only be for ancient gardens and orchards. *Bunb.* 79.

Modus. [And a modus of 1*s.* 6*d.* in the pound for *potatoes* and *turnips* was held bad: first, because the measure of money by the pound was not known in England till the time of *Car.* 1.; and secondly and principally, because they are of modern introduction. (4) Payment of a composition for tithe of turnips, *whether pulled* or *eaten off*, where neither party considered it an *agistment* tithe, is no evidence of perception of that species of tithe. (5)]

IX. *Fruits of trees, as apples, pears, acorns, mast.*

Fruits of orchards. 1. Fruit of trees, as *apples*, *pears*, *plums*, *cherries*, and the like, are prædial tithes, to be paid in kind when they are gathered;

(3) *Worrall* v. *Miller and Sweet*, 3 *Anstr. R.* 632. *Gwm.* 1436. *Plowd. on Tithes*, 130.

(4) *Layng* v. *Yarborough*, 4 *Pri. R.* 388. 102.

(5) *Garnons* v. *Barnard*, 1 *Anstr. R.* 320.

unless there is some modus or rate tithe paid in lieu thereof. *God.* 408.

Which fruits if they are stolen, and not gathered by the owner, the parson as well as the owner shall bear the loss: But if the owner doth suffer a stranger to pull or take his fruits, the tithe shall be answered. *Hetl.* 100. (6)

[497] If the soil of an orchard be sown with any kind of grain, the parson shall have the tithe of the fruit trees and of the grain, as also of the grass or hay; for they are of several and distinct kinds. 1 *Roll's Abr.* 642. *Deg. p.* 2. *c.* 3. *God.* 412.

[Mast and acorns.] 2. Dr. Godolphin says, mast of oak or beech, if sold, the tenth penny is payable for the tithe thereof; but if eaten by swine, then the tenth of the value or worth thereof. *God.* 417.

And so Lindwood saith, if the said fruits shall be sold, there shall be paid the tenth penny; and if they be not sold, but the hogs do feed thereupon, then the owner of the hogs shall pay the tithe according to the value of such fruits. *Lind.* 200.

And there is a writ of consultation in the register for the tithes of pannage. And lord *Coke* says, for acorns tithes shall be paid, because they renew yearly. And in *Reynold*'s case, *T.* 2. *Ja.*, it was said, that of acorns severed tithes are payable. *Gibs.* 676. *Mo.* 762.

But where the case was, that the acorns dropt from the trees, and the hogs eat them, a distinction was made that they shall not be tithable, unless gathered and sold. *Het.* 27. *Litt.* 40. *Gibs.* 676. [*Wallis* v. *Paine*, *Bunb.* 344. 2 *Com.* 633.]

In short, the case of acorns seemeth not different from that of other things tithable; if gathered, they shall pay tithes in kind; and the tenth penny, or 2*s.* in the pound, in all such like cases, is not to be considered as exclusive of the tithes to be paid in kind, but only as a reasonable satisfaction when the parishioner disposeth of his whole produce unsevered. And where the acorns are not gathered by the owner, but suffered to be fed upon as they drop; the case seemeth to fall under the same equity, as where turnips are fed upon by unprofitable cattle, for which an agistment tithe shall be paid.

[498] X. *Calves, colts, kids, pigs.*

The tenth *calf* is due to the parson of common right, to be taken when it is weaned, and not before (7); and it is recoverable

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(6) See also 2 *Inst.* 252. *Gibs. Cod.* 680. *Com. Dig.* tit. *Dismes* (H 10.). *Chiver* v. *Pullen*, 1 *Wood. D.* 212. *Stile*'s case, *Lit. R.* 147.

Apples or other fruit in an orchard shall not pay tithes, if there is a modus to pay 4*d.* for every hogshead of cyder, or 2*s.* *per ann.* in lieu. *Hill* v. *Harris*, (*M.* 1685.) 2 *Show. R.* 461. Black cherries growing wild in hedges and used as fences shall pay tithe. *Chapman* v. *Barlow*, *Bunb. R.* 184.

(7) Though this may be varied by the custom of different places,

in the spiritual court, as appears from a writ of consultation in the register. And in case there are fewer than ten, it hath been adjudged a good custom (which evidently did spring from the canon law), that if there are seven, the parson shall have one calf; if under seven, then an halfpenny, or what custom shall direct, for each calf. *Gibs.* 708.

But in most places, as it seemeth, at this day, the custom hath obtained (which is the proper rule in all such cases, and is equitable in itself) that if there are five, the parson shall have the value of half a calf, lamb, or other such like; if there are six, he shall have one entire; and shall receive or pay out respectively a proportionable sum, for each number under five or above six.

[In *Kenyon* v. *West* (8) the question was, whether a single calf were tithable or not; and the court held, that the tenth part of the value of the calf, when taken from the cow to be sold or killed, was the tithe to be paid.]

The canon law leaves it to the choice of the parson, when they are under the full number, whether he will proceed in the like manner, or let them run on till one becomes due in the ensuing year; but the common law will not allow of this, because tithe must be paid annually. 1 *Roll's Abr.* 648.

Thus in the case of *Egerton* and *Still*, *T.* 1725, it was decreed that where there are above ten calves, lambs, pigs, or the like; the tithe of the odd number above ten shall be paid according to the value, and not be carried over to the next year. *Bunb.* 198. [2 *Wood's Dec.* 251.]

Colts are tithable in the same manner as calves. *Gibs.* 678.

Also tithes of *pigs* are to be paid in the same manner as tithe of calves. *Gibs.* 684.

[A custom to pay one pig where the number farrowed is seven, and does not exceed ten, and to pay nothing where the number is under seven, is good. *Mantell* v. *Paine*, 4 *Gwill.* 1504.]

And generally, the *time* of payment of the tithe of calves, colts, lambs, kids, pigs, and such like young of cattle, is when they are so old that they may be weaned, and live without the dam upon the same food that the dam eateth (9); unless the custom of the place confine the payment to any certain time or age. *Deg. p.* 2. *c.* 6. (*o*)

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yet if the delivery of the calf is entirely determinable at will of the owner, the custom is unreasonable. *Jenkinson* v. *Royston*, 1 *Dan. R.* 128. 5 *Pri. R.* 510.

(8) *Gwm.* 541. 1 *Wood's Dec.* 313.

(9) *Newman* v. *Morgan*, 1 *Campb. C. N. P.* 308. *notis.* *Croft* v. *Blake*, *Gwm.* 530. *Reynolds* v. *Vincent*, *Bunb. R.* 133. *Jenkinson* v. *Royston*, 1 *Dan. R.* 128. 5 *Pri. R.* 510. *Com. Dig* tit. *Dismes* (H 10.).

(*o*) Vide *Croft's* case, *infra*, *IX.* 2. A custom to tithe lambs when three weeks old was held to be unreasonable and bad. *Reynolds* v.

And as the parson is to have the tithes of the young and increase of the cattle, so he on his part is to observe the custom of the place, for the better propagation of their increase; otherwise any parishioner grieved may have an action on the case against him. As in the case of *Yielding* and *Fay*, *T.* 39 *Eliz.* An action upon the case was brought against the defendant as parson of Quarbey in the county of Southampton, declaring that within the parish there is a custom, that the parson at all times of the year had used to keep a common *bull* and a *boar*, for the common use of the kine and sows of the parishioners, for the increase of calves and pigs within the parish; and that the defendant being parson there, had neglected to keep them; by reason whereof, the plaintiff being an inhabitant had lost the increase of his cattle. And the court was of opinion, that this was a reasonable custom, and that every inhabitant, prejudiced by the not keeping the bull and boar, might maintain the action. *Cro. El.* 569.

And the like was decreed in the case of *Phillips* and *Symes*, *T.* 1724. *Bunb.* 171.

To whom payable. [See XI. 4.]

XI. *Wool and lamb.*

A mixt small tithe. 1. Wool and lamb are generally reckoned mixt small tithes. *Gibs.* 682. 686.

At what time due. 2. Tithe of wool *de jure* is due at the time when it is clipped: but by prescription it may be set out altogether at another time. *Wats. c.* 50. (1)

[The right to the tithe of lambs vests at the time when they are yeaned, although the tithe cannot be set out till they are fit to be weaned. (2) For the young of animals before birth may be compared with a growing crop, the right to tithe of which accrues on severance from the land, though that tithe is not to be *set out* till a later period. (3)]

Regularly, the time of payment of the tithe of lambs (as was observed under the last head) is, when they are weaned, and can live without the dam; unless the custom of the place be otherwise. *God.* 416. *Bunb.* 133.

[illegible] In the case of *Heaton*, impropriator of Garnthorp in Lincoln-

Vincent, *Bunb.* 113. But in *Brinklow* v. *Edmunds*, *Bunb.* 307., a custom to deliver the tenth lamb and pig on St. Mark's day was supported, because the parson had the benefit of choosing his one after the parishioner had taken two.

(1) *Green* v. *Hun*, *Cro. El.* 702. 3 *Cruise*, *D.* tit. 22. § 54. *Gold's case*, *Ambl. R.* 149.

(2) *Welch* v. *Uphill*, Clerk, 1 *Taunt.* & *Brod. Rep.* 84. 3 *B. Moore's R.* 330. S. C. *Boys* v. *Ellis*, *Gwm.* 647. *Bunb.* 139.

(3) See, *per Richardson* J., *Welch* v. *Uphill*.

shire, against *Regal*; the defendant insisted on a custom in that parish, to set forth tithe lambs on the first of May. But the court disallowed of it: for that they were not fit to live without their dams, as appeared by the depositions in the case. And it was referred to three neighbouring justices of the peace, to inquire what was a fit time for setting forth tithe lambs in that country; who certified the first of August, in their judgment, to be a proper time. And the court approved of it. [*Gwm.* 630.]

So in the case of *Crofts*, rector of Upper Clatford in Hampshire. The defendant insisted on a custom in that parish, to set forth tithe lambs at St. Mark's day [25th April]. The court declared it to be a void custom, and that the time for setting forth [500] tithe lambs is, when they are fit to live without their dams, and thrive on the same food that their dam lives on, and when the owner weans his own. (4)

T. 9 *G. Reynolds*, rector of Stoke Charitie in Hampshire, against *Vincent*. The defendant insisted on the same custom with that before insisted on at Upper Clatford; which, on citing the two former decrees, and hearing counsel on both sides, was again set aside for the same reason. [But in *Lister* v. *Foy*(5) a custom of tithing such lambs as are able to subsist without the ewes on St. Mark's day (25th April), and such as are unable to subsist without the ewes on that day, when they are capable of living alone, was held good.]

Upon the whole, one precise determinate day cannot be equally applicable to all places and seasons. This must depend in some measure upon the situation of the country, the time of putting their ewes to the ram, and the forwardness or backwardness of the season in general. What cometh nearest to the matter, where there is no special custom concerning the same, seemeth to be what was declared by the court in the case of Upper Clatford above mentioned; namely, that the properest time for the parson to take the tithe is, when the owner weaneth the rest: for it is not supposable, that the owner will wean his lambs sooner, or keep them with the ewes longer, than they are fit to be weaned; the former being a prejudice to the lamb, and the latter to the ewe. (6)

In what manner to be tithed.

3. In the case of *Wilson* and *The bishop of Carlisle*, *T.* 13 *Ja.* Wilson brought a prohibition against the bishop, who held the living of Graystock in commendam; and said, that there was within the parish of Graystock this custom for tithing of wool, that if any inhabitant have five fleeces of wool or above, he shall

(4) *Gwm.* 630. Usage alone will not establish a custom; reasonableness is material. *Per Eyre* C.B. *Bedford* v. *Sambell*, *Gwm.* 1058.

(5) *Gwm.* 579.

(6) Vide *supra*, X.

after the shearing and binding up of the same, without fraud or deceit, pay to the rector (after notice given) the tenth part thereof, at the door of the mansion-house of such person inhabiting within the said parish, without sight or touch of the nine parts by the rector or his agent; and that the parsons have so accepted it. To this the bishop demurred in law. And it was adjudged for the bishop with one consent. For the substance of the prescription is laid, that the very true tenth is and ought to be paid without fraud; which is not prescribable, for it is common right. Then the sole point prescriptible is, that this is without view or touch of the nine parts; which is, in effect, repugnant to the other: for when you have laid the truth in the
[501] former part, you lay the way to fraud in the latter. For it is against common reason, that any man judge or divide for himself, and then take choice of his own division, against the rule of partition laid down by Littleton; for the truth of the tenth depends on the proportion it holds with the nine parts; and therefore for the parishioner to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists; and the prescription were as reasonable as to say plainly, that they might set out what tithe they pleased. And it is a weak answer to say, that if it be not a just tenth, he may refuse it, and sue for his due. For he hath no means to be assured whether it be true or not; so his suit may be causeless: Sure he may be, it will be fruitless. But the law was provided, not to cause, but to prevent suits; and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing. *Hob.* 107.

So in the case of *Christian* against *Wren and others*, *M.* 1732; on a bill by the vicar of Crosthwaite in the county of Cumberland for tithes, the defendants insisted on a customary manner of payment of tithe wool of the elder sheep, by weighing the wool, and delivering the tenth part without fraud to the vicar, without his seeing or touching it: but this was overruled, on the authority of the aforesaid case in Hobart. *Bunb.* 301.

In the same case, the parishioners insisted, that they ought to pay no tithe of hog wool (that is, of the wool of sheep of a year old); alleging that no tithe thereof had ever been paid; that the tenth lamb having been paid (or a composition for the same), the other nine should not pay tithe of their wool that same year; and insisting further that a modus being paid for the tithe lambs, the said modus included also the tithe of the hog wool. But the evidence not coming up to the proof of its being included within the modus, and the other allegations being plainly setting up a *non decimando*; it was decreed that the tithes of the hog wool should be paid as well as of all the other wool. (For it is clearly a new increase.)

By a constitution of archbishop *Winchelsea*, it is ordained as follows: Of the young of animals, as of lambs, we do ordain, that for six lambs and under, six halfpence be given for the tithe; but if there be seven lambs in number, the seventh lamb shall be given to the rector for tithe; yet so, that the rector of the church who taketh the seventh lamb, shall pay to the parishioner of whom he taketh the tithe three halfpence in recompence; he that taketh the eighth lamb shall give a penny; he [502] that taketh the ninth shall give an halfpenny to the parishioner: or the rector (if he pleaseth) shall stay till the next year, until he may take a full tenth lamb, and he who so stayeth, shall take always the second-best lamb, or the third at least, of the lambs of the second year; and this, for his staying the first year. And so it is to be understood of the tithe of wool. *Lind.* 191.

And these sums, according to the value of money at that time, were computed as a reasonable equivalent.

But where it is said that the rector shall have his election to take his tithe in that manner, or to let them run on till a lamb or fleece be due in the ensuing year, that is not allowed by the common law; for tithes must be paid annually. *Deg. p.* 2. *c.*6.

Also (as was observed before) custom, which is a part of the common law, seemeth to have established in most places, that the parson shall have half the value of a lamb at five, and a lamb entire at six, and shall receive or pay out proportionably for the numbers under five and above six. (7)

[How payable.]

If the custom be to pay the tithe of wool by the pound, and there be under ten pounds of wool; in such case a reasonable consideration shall be paid; because being due *de jure*, a modus *in non decimando* cannot be allowed in any case. 1 *Roll's Abr.* 648. [In some places the tithe is paid by the fleece. (8)]

How to be proportioned in different parishes. [See *ante, II.* 475.]

4. By a constitution of archbishop *Winchelsea*; lambs, and other tithable young, shall be tithed proportionably, having regard to the different places where they are begotten, brought forth, and nourished, and to the times which they have continued therein. *Lind.* 197. (9)

And by another constitution of the same archbishop; if the sheep be kept in one parish in winter, and in another parish in the summer, the tithe shall be divided proportionably, according to the time that they shall continue in each parish. *Lind.* 194.

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(7) In *Selby* v. *Clarke*, 1 *Ld. Raym.* 677., it is said that for fewer than ten lambs no tithe is payable.

(8) *Wilson* v. *Wilkinson*, 2 *Stra. R.* 783.

(9) The tithe of young animals, as colts, calves, kids, pigs, and lambs, is to be paid to the tithe owner of that parish where the young are engendered, brought forth, and nourished. *Poph. R.* 197. But if brought forth in another parish, the tithe owner there has perhaps the right of tithe. *Wright* v. *Elderton*, *Gwm.* 607.

But no space less than that of thirty days, shall be reckoned in the computation; that is to say, of thirty days together, and not by intermission. *Lind.* 198.

Whereupon Dr. Wood observeth, that if lambs are yeaned in another parish, and do not tarry there thirty days or more; no tithe is due for them to the parson of that place. *Wood. b.* 2. *c.* 2. [But see *Welch* v. *Uphill*, *p.* 499.]

And Dr. Godolphin says, if sheep stray out of one parish into another, and there yean, no tithe is payable for this to the parson of that place; but if they go there for thirty days or more, for this a rate tithe is payable to that place; for, for sheep removed
[503] from one parish to another each parson must have tithe *pro rata;* but under thirty days no rate tithe is to be paid. *God.* 438. (1)

Again, by one of the aforesaid constitutions, if sheep do couch in one parish, and feed in another, the tithe shall be divided between the two churches: Yet (saith Lindwood) not equally, but proportionably; for the far greater part ought to be assigned to that church within the parish whereof they fed for the time, than to that where they only couched. *Lind.* 198.

And further; by the said constitution it is ordained, that if foreign sheep shall be shorn in any parish, the tithe shall be there delivered to the rector of the church, unless he can be sufficiently informed that satisfaction hath been made for the tithe elsewhere, so as lawfully to hinder the payment thereof in such parish where they are shorn. *Lind.* 197. *God.* 438.

In like manner, if a person shall buy or sell any sheep, and it is certain from what parish the sheep do come, the tithe thereof shall be proportionably divided between the two parishes; but if it be uncertain, that church shall have the whole tithe within the limits whereof they are found at the time of shearing. *Lind.* 194.

But Mr. Bunbury seemeth to be of opinion, that the tithe of lambs must be paid where they fall, and is not a divisible thing, as wool is. *Bunb.* 139.

And it is now clearly held, that the tithe both of wool and lambs shall be paid where the sheep lamb or are shorn. (2)

(1) But according to modern law, it would seem most probable that the tithe of wool for a much less period than 30 days might now be successfully demanded in the parish where the sheep are shorn. Thus where lambs were brought into a parish in August and shorn four days after they were so brought in, their wool was held tithable there. *Beaumont* v. *Shilcot*, 3 *Wood's Dec.* 172. And the wool of lambs is tithable, though the lambs have been tithed two months before. *Baker* v. *Sweet*, *Bunb. R.* 90.

(2) Cited by *Burrough* J. 1 *Brod. & Bing. Rep.* 91.; who added, "But it is now clear that as well tithe of lamb as of wool accrues in the *respective* places where the lamb is dropped and wool shorn." See

Indeed, if the sheep be carried away necessarily, and but a little before shearing or lambing time; this is fraudulent: and the tithes shall be paid, in such case, in that parish from whence they were fraudulently removed.

But if they shall be removed without fraud; it is held in equity, that no part of the tithe of wool or lamb will be payable in that parish from whence they were removed, but an agistment tithe must be paid for them, as for cattle yielding no profit to the incumbent there; and that these tithes are in no case to be divided, but the whole to be paid where they lamb or are shorn, and an agistment tithe for them as unprofitable cattle in every other parish where they have been depastured. (3) [[illegible]]

And no regard is had to the distinction, whether they have continued for less than a month; for there is the same equity, that tithes shall be paid for one day as for thirty.

Nor is the objection of any force, that in such case the sheep pays two tithes in one year: for that is not the fact. The tithe [504] of wool is one thing; the tithe of agistment is quite another, being only tithe of the herbage, which if suffered to grow to maturity would have yielded tithe of hay, or if the land had been sown with corn, a corn tithe must have been paid.

Sheep removed to avoid the payment of tithe lambs.

5. In the case of *Boys* and *Ellis*, *M.* 1723; in a bill for tithes, a question arose, whether there was fraud in tithing lambs, on this case: The ewes were kept by the defendant in the parish of Driffield in the county of York (where the demand lay), all the year until Christmas, when they were ready to drop their lambs, and then were removed into the parish of Skern (where there was a small modus only for lambs), and there kept till Lady-day, for convenience of forage (as insisted upon by the defendant); and at Lady-day were brought back to Driffield: Note, the land in Skern was the defendant's own land. By the court; Here is not a sufficient proof of fraud: and the plaintiff's bill was dismissed. But Page and Gilbert barons thought, at first, it might be proper to send it to an issue, to try whether fraud or not fraud, and whether this had been the usual method of the defendant's course of husbandry; but afterwards they concurred with baron Price. [*Bunb.* 139. *Gwm.* 647. S. C.] (4)

Sheep dying or killed.

6. There is no doubt but that wool is tithable *de jure*; and therefore it hath been adjudged, that however for the pelts or fells

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ante, II. p. 499. So in *Selby* v. *Clarke*, 1 *Ld. Raym.* 677., lambs are *de jure* tithable in the parish where they are dropped.

(3) See last note.

(4) To remove sheep fed in one parish to another place just before the shearing and lambing seasons, and then driving them back again without accounting for the tithes in the parish where they were depastured, is a fraud in equity; and an account of the number of sheep removed will be decreed. *Hall* v. *Maltby*, *H.* 1819, 6 *Pri. R.* 240.

of sheep killed and spent in the house, no tithe shall be paid, yet the wool shall pay tithe; and for these as well as for sheep which die, a consultation is provided in the register. 1 *Roll's Abr.* 646. *God.* 429. 463. *Deg. p.* 2. *c.* 6. *Gibs.* 686.

But others have holden, that if sheep be shorn, and die of the rot or other disease, before the next shearing time, the wool is not tithable, unless the parson can prescribe to have it. *Wats. c.* 49.

In the case of *Brinklow* and *Edmonds*, *M.* 1731; an halfpenny payable on the shearing day for the wool of each sheep dying between Candlemas and shearing day was admitted and established as a good modus. *Bunb.* 307.

Lamb's wool.

7. If a man pay tithe lamb at Mark's tide, and afterwards at Midsummer he sheareth the residue of the lambs, to wit, the nine parts; he ought to pay tithe of the wool thereof, although there are only two months between the time of payment of the tithe of the lambs unshorn, and of the shearing of the residue; for this is a new increase. 1 *Roll's Abr.* 642.

[505] So in the case of *Baker* and *Sweet*, *M.* 1721, it seemed to be admitted, that the wool of lambs shall pay tithes, although the lambs had paid tithes two months before. *Bunb.* 90.

And in the case of *Carthew* and *Edwards*, *T.* 1749. The plaintiff brought his bill, amongst other things, for the tithe of the wool of lambs. The defendant answered, that he apprehended no tithe of lambs' wool to be due, the plaintiff having received the full tithe of the lambs in their wool. But by the court, it was declared, that the tithe of the wool of lambs was due to the plaintiff, and decreed accordingly.

So where a modus is paid for a tithe lamb, and the other nine lambs are shorn; tithes shall be paid of the wool thereof: for wool and lamb are different species of tithes, and therefore a modus for lambs is no satisfaction for the tithe of wool.

Sheep agisted.

8. By a constitution of archbishop *Winchelsea*; tithes of wool shall be paid to the incumbent in whose parish the sheep have remained constantly from the time of shearing till Martinmas, though they be afterwards removed; and if they be removed within the said time from parish to parish, each incumbent in whose parish they shall remain at least thirty days, shall have his proportion of the wool; but if they be removed from parish to parish after the said time (that is, from Martinmas to the time of shearing), a reasonable agistment shall be paid by the owners for the time they stay. *Lind.* 197.

But this seemeth not to be law at this day: but the tithe in kind of wool shall be paid only in the parish where the sheep are shorn; and an agistment tithe in the other parishes where they have been depastured. Otherwise it might be very inconvenient

to proportion and divide the wool; especially where the parishes shall be (as it may happen) at a very great distance.

And in a case where the owner of the sheep had depastured them in the parish, from Michaelmas to Lady-day, and then sold them; upon suit in the spiritual court for a tenth of the bargain, the owner to obtain a prohibition surmised that he could pay a tenth of the wool, according to the custom of the parish: But a prohibition was denied, because the parson was defrauded of all, if he had not the tenth of the bargain; inasmuch as the sheep were gone out of the parish, and he could not have any wool, because it was not the time of shearing. *Poph.* 197. (*p*)

[Upon the whole, it is observable, that the measure of right in the ecclesiastical courts by the canons, and in the courts of equity by the rules of equity (without much regard to the canons), is very different; which may cause confusion in these respects. In the former case, the last resort is to the delegates; in the latter to the house of lords.] [506]

Locks of wool.

9. No tithes shall be paid of locks of wool, if it appear that they were casually lost; but otherwise, if by contrivance and fraud. 2 *Inst.* 652. *God.* 462.

Where the custom is, to shear the necks of sheep about Michaelmas, to prevent the tearing off of the same by thorns and briers in the winter; if this be done without fraud, and not to deceive the parson, then no tithe shall be paid for the same. 1 *Roll's Abr.* 645. [*pl.* 45. 50.]

So if a parishioner cut off the dirty locks of his sheep for their better preservation from vermin, before the time of shearing, and this without fraud; no tithes shall be paid thereof. 1 *Roll's Abr.* 646. [But see *Com. Dig.* tit. *Dismes* (H 7.).]

Several flocks depastured together.

10. If several men's sheep depasture together in one flock, or under one shepherd; yet this shall not make them to be tithed together, but every owner shall pay his tithe of them by himself: but if the head of a family hath his flock mixed with his children's sheep which are under his tuition, and he takes the profit of them to his own use; in that case they shall be tithed together. *Lind.* 193. *Deg.* *p.* 2. *c.* 6.

Modus.

11. It hath been held, that if a man prescribe to pay an halfpenny for every lamb that he shall sell before the first day of May, and (to deceive the parson) shall sell all his lambs the day before May-day; this is fraudulent, and the custom shall be no discharge. 1 *Roll's Abr.* 652.

It is not a good modus, to pay every tenth pound of wool for the tithe of wool, if he doth not shew that he hath paid something if his wool do not amount to ten pounds; for otherwise this is

(*p*) But see *supra*, *II.* *Agistment*, 6.

in non decimando if it be under ten pounds; for the tenth part thereof is due. 1 *Roll's Abr.* 648.

If a prescription be, that if the owner hath under the number of ten fleeces of wool, he shall pay one penny to the parson for the tithe of each of them; and if he hath more, that then he shall deliver to the parson the tenth part of his wool upon his conscience without fraud or covin, without the parson's seeing or touching the nine parts; this is not a good modus, for that it is unreasonable, and is in effect to give to the parson no more than the parishioner pleased. 1 *Roll's Abr.* 648.

[507] A custom to pay tithes in kind for sheep, if they continue in the parish all the year, and if they be sold before shearing time, but a halfpenny for every one so sold, hath been held an unreasonable custom. *Boh.* 94.

A modus to pay the tenth part of the wool of all the sheep which he had before Lady-day, in satisfaction of all the wool of such sheep as should by him be brought into the parish after Lady-day, hath been allowed to be good. 1 *Roll's Abr.* 649.

So also a modus to be discharged of tithe of those he should sell but two days before the shearing, in consideration that time out of mind he hath paid tithe wool of those which he bought but two days before the shearing, hath been allowed to be good. 1 *Roll's Abr.* 649.

[A modus of 1*d.* for each lamb where not exceeding four; 1*s.* where the number did not exceed five; 1*s.* 8*d.* where not exceeding six; 1*s.* 9*d.* where not exceeding seven; 1*s.* 10*d.* where not exceeding eight; 1*s.* 11*d.* where not exceeding nine; and 2*s.* where not exceeding ten; — was held not rank; but the court directed an issue. (5) But a custom that tithe lambs should be delivered the 1st of May; and that if any person have under seven lambs, he is to pay for each a halfpenny; and if seven lambs and under ten, one lamb; and to be allowed for every lamb short of ten a halfpenny, and so likewise for any odd number; — is bad. (6)]

XII. *Milk and cheese.*

A mixt tithe.

1. Milk is a mixed [small] tithe. *Gibs.* 713. [It is alike payable whether the animal is fed on pasture in the parish or in stalls on oil-cakes, hay, vetches, or other produce which has before paid tithes in kind. Milk is *per se* tithable, and not due by way of commutation for food eaten by the cow. (7)]

Not milk and cheese both.

2. Where tithe milk is paid in kind, no tithe cheese is due; and where tithe cheese is paid in kind, no tithe milk is due: In

(5) *Askew* v. *Greenhow*, (*T.* 1816,) 2 *Pri. R.* 314. *n.*

(6) *Jenkinson* v. *Royston*, 1 *Dan. R.* 129.

(7) *Wordsworth* v. *Bates*, *cor. Richards* C. B., sittings after *T. T.* 1821. *Mireh.* 89. *note.*

which case, as in all other like cases, the custom of the place is to be observed. *Deg. p.* 2. *c.* 6. *God.* 392. (8)

3. And by a constitution of archbishop *Winchelsea*; the tithe of milk shall be paid, from the time of its first renewing, as well in the month of August as in other months. *Lind.* 199. **Payment thereof by canon.**

Upon what pretence the people pleaded exemption from paying tithe of milk in August, Lindwood doth not inform us: probably it was, because this was the principal harvest month; and they thought it too much to pay tithe of milk while they were paying tithe for corn, and fed their harvest people with the milk. *Johns. Winch.*

Lindwood explains the milk here spoken of, to signify either that of cows, or sheep, or goats, or other cattle which are milked. *Lind.* 200.

But the tithe of milk of ewes seemeth only to be due by custom: for a man may prescribe that by the custom of the country were he is sued for tithes of the milk of ewes, no tithes of the milk of ewes have been paid for time whereof the memory of man is not to the contrary; and in such case a prohibition will be granted. 1 *Roll's Abr.* 651.

4. By a constitution of archbishop *Winchelsea*; the tithe of the milk and cheese of cows and goats *shall be paid where they feed and couch.* Otherwise, if they couch in one parish, and feed in another, the tithe shall be divided between the rectors. *Lind.* 199. **Different parishes.** [508]

But it may be doubted perhaps, as the law seemeth now to stand, whether they shall not pay tithe in kind only in the parish where they are milked (9), and an agistment tithe in the other parish. (9)

M. 8 *W. Scoles* and *Lowther.* Lowther was parson of the parish of Swillington; and Scoles lived in Kippax, the next adjoining parish, and occupied a large parcel of arable land in Kippax, and had also forty acres of meadow and pasture in Swillington, and four acres of arable land. Lowther libelled in the spiritual court of York against Scoles, for tithes of the cattle depastured in Swillington. Scoles, upon a suggestion that cattle kept for the pail for the use of the house ought not by the law to pay tithes, and that this cattle for the tithes whereof Lowther now libels is such, moved for a prohibition. And it was granted to him unless cause shewn. And now upon affidavit that Scoles carried the milk of this cattle to his house in Kippax, and used it there, it was moved that the rule might be discharged. And it was resolved by the whole court, that the defendant Lowther should have the tithes of this milk. *L. Raym.* 129.

(8) *Austyn* v. *Lucas*, *Cro. El.* 609. *Wats. Cl. L.* 555.
(9) But see *Wright* v. *Elderton*, 1 *Wood's D.* 519. *Gwm.* 607. *acc.*

And as to the tithe of the *milk of sheep*, it is ordained by the said constitution, that in the parishes where the sheep continually feed from the time of shearing to the feast of St. Martin in the winter, the tithe of their milk and cheese shall be fully paid to the churches there, although they shall be afterwards removed from that parish and be shorn elsewhere. And if within the aforesaid time, they be removed to pasture in divers parishes; every church, according to a proportionable part of the time, shall receive the tithe thereof; but no space less than that of thirty days shall be reckoned in the computation But if after the feast of St. Martin, they be carried to pastures elsewhere, and be fed even until the time of shearing in one or in divers parishes, in the pastures of their owner or of any other; the pastures shall be valued, having respect to the number of sheep, and according to such valuation of the pastures, the tithes shall be demanded of the owners of such pastures. *Lind.* 197.

And the reason is, because after the feast of St. Martin sheep are not usually milked. And therefore this constitution requireth that the tithe be paid according to the value of the pasture for so
[509] many sheep there depastured. Otherwise if they should lie there, and in the mean time give milk, and cheese should be made thereof, then the tithe of milk and of cheese should be paid as they should fall out. *Lind.* 198.

When milk shall be paid, and when cheese.

5. By another constitution of the same archbishop, the tithe of milk shall be paid in cheese, whilst the parishioner maketh cheese: but in the autumn and winter it shall be paid in kind; unless the parishioners will for the same make a competent redemption to the value of the tithe and the benefit of the church. *Lind.* 194.

But the canon in this, as in other instances, is generally overruled by the custom of the place; for in many places they pay the milk in kind all the year: in some places they pay only cheese; and in some neither cheese nor milk, but some small rate for it: and the custom of the place in this as in all other tithing, is to be observed, notwithstanding the canon. *Deg. p.* 2. *c.* 6.

Agistment of milk cattle.

6. When milch cows are become dry, and are depastured as dry cattle, though but for a month; an agistment tithe shall be paid for them: and so it is, if they are fatted and sold. *Boh.* 96.

Manner of tithing.

7. The tithe of milk is to be paid, not by the tenth part of every meal, but by every tenth meal intire. *Bunb.* 20.

In the aforesaid case of *Scoles* and *Lowther*, it was said by the court, that of common right tithe milk is payable at the parsonage or vicarage house; in which particular this tithe differs from all others, which must be fetched by the receiver; but by custom the payment may be made in the church porch, whither it shall be brought by the parishioners. *L. Raym.* 129. *Wood. b.* 2. *c.* 2.

But in the case of *Dodson* and *Oliver*, *E.* 1721; it was decreed that if there be any custom in a parish for the manner of tithing milk, as to carry it to the church porch, or parsonage house, that must be observed by the parishioner; but if there be no particular custom or usage, the parishioner is obliged *de jure* to pay every tenth meal, to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking place in his own pails in a reasonable time; and if he doth not fetch it before the next milking time, the parishioner may justify pouring the milk upon the ground, because he hath occasion for his own pails. And it was determined by the whole court of exchequer in this case, that the milk ought not to be carried either to the church porch, or to the parson's house, and [510] that it ought to be fetched by the parson. *Bunb.* 73. (*q*)

So in the case of *Carthew* and *Edwards*, *T.* 1749. Edward Carthew, clerk, rector of St. Mewan in Cornwall, brought this bill in the exchequer (amongst other particulars) for the tithe of milk. The defendant Edwards in his answer set forth, that the plaintiff having declared he would not send for or fetch the tithe milk, he did order every tenth meal of his cows to be turned upon the ground; it not being usual or customary for the parishioners of the said parish to carry their tithe milk home to the rector. The court, upon hearing the cause, and ordering two decrees in the said court to be read, wherein Dobson was plaintiff and Oliver defendant, did declare, that the defendant ought to have milked the tenth meal of his cows, in vessels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own vessels. (*r*)

In the case of Dr. *Bosworth*, rector of Tortworth in Gloucestershire, against *Limbrick and others*, *M.* 1777 (1), Mr. Baron *Eyre* delivered the resolution of the court as follows: The plaintiff by his bill complains, that he hath been defrauded of one third of his tithe milk, by the setting forth the tithe on an evening, and never on a morning, under a plea of the defendants, that the *tenth* meal was assigned to the parson by law. They allege, that they have duly set out to the plaintiff, for his tithe, every fifth evening's meal; which, they say, is the tenth meal to which the parson is intitled: They having brought their cows to the pail in the morning, and beginning to count from the morning of that

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(*q*) That tender of tithe cheese at the house of the parishioner is good, see *Wiseman* v. *Denham*, 2 *Roll. Rep.* 328. *Palm.* 341. 381.
[A custom that a parson shall send for his tithe milk, is good. *Hill* v. *Vaux*, 1 *Raym.* 358. 2 *Salk.* 656.]

(*r*) S. P. *Carthew* v. *Edwards*, *Amb.* 72. [And see *Hutchins* v. *Trull*, 4 *Wood's D.* 155. *Morgan* v. *Neville*, *Gwm.* 1046.]

(1) *Gwm.* 1101. 4 *Wood's D.* 24.

day to the evening, and so on, the fifth evening's meal of milk makes the tenth meal, which is the parson's due. The plaintiff contends, that the setting out every fifth evening's meal is not the due mode of tithing; that the produce of the evening's meal, from physical as well as other causes, must always be less in quantity than the morning's meal. And the witnesses on both sides agreed, that the fact is so, though they differ a great deal as to the proportion. One of the plaintiff's witnesses made a great
[511] number of experiments, in order to ascertain the proportion in which the evening's meal fell short; and it appeared upon the result of these experiments, that it frequently fell short a third, but never less than a fourth part of the morning's. It therefore follows, as a necessary consequence, that a fifth evening's meal, constantly set out to the parson, must produce him less upon the whole than a tenth part of the milk. This being the fact, the argument proceeds thus: The tithe of milk (as of all other tithable matters) belonging *de jure* to the parson, is the tenth part of the milk produced. A rule of tithing, therefore, which necessarily gives to the parson less than the tenth cannot be the true rule. This was the sum of the argument urged for the plaintiff. It was admitted, that it had been thus far settled, by the few cases that are to be found on the subject of tithe milk, that neither the tenth part of every cow's milk at every meal, nor the tenth part of the whole meal, were to be set out to the parson, and that the *tenth meal* was the tithe to be set out. But for the plaintiff, it was insisted, that the tenth meal must not be so computed, as necessarily to produce less than a tenth part of the whole ten meals taken together. — Upon general principles: We find it difficult to persuade ourselves, that that can be a true rule of tithing which puts it in the power of the parishioner to give the parson perhaps a twelfth, a thirteenth, or a fourteenth, instead of a tenth part. A prescription to pay less than a tenth, we all know, would be a void prescription, unless it were assisted by some consideration to make the parson amends for the difference between the tenth and that less which the prescription proposed to give him. When the tenth meal was declared to be the right of the parson, it was certainly substituted in the place of the tenth quart; or the tenth dish, or the tenth part of each meal. It was not meant to give less than the tenth, but the object was to give the tenth in a more convenient and more useful form. It was therefore auxiliary to the general right of a tenth: it was intended to fortify, and not to destroy, that right. If therefore a construction can be put upon this rule of tithing, which will preserve the original spirit of it, and put it out of the power of any man to make it an instrument of wrong and injustice, this court will strongly incline to adopt such a construction. And upon consideration, we think it may admit such a construction. The morning and evening

meals, being necessarily unequal in produce, may, and, we think, ought to be, considered as distinct tithable matters, from each of which you may count on to the tenth, which will be the right of the parson; and that tenth will be the tenth meal of that description to which it belongs, either morning or evening: and in this way the parson will, upon the whole, have his full tenth, as much as he can have in the manner of collecting any other species of tithes whatever; instead of necessarily taking less than a tenth in the defendant's way of setting out his tithes. And, in respect to authority, upon a careful review of all the cases that we have been able to find upon this subject, we not only do not find any adjudged cases standing in our way, but we collect that the rule of the tenth meal was originally understood in the sense in which we think it ought now to be understood. There appears therefore to us nothing, in point of argument or authority, which should prevent us from effecting the justice of the case between these parties, by declaring that the defendants ought to have paid to the plaintiff the tenth morning's meal, and the tenth evening's meal, of this milk; in which having failed, they will be decreed to account. — The *costs* in this cause remain to be considered. Hitherto we have considered the case in the abstract, for the sake of the dry point, detached from every circumstance of fact, the single fact of inequality in the morning's and evening's milk only excepted, upon which the whole arises. But upon the question of costs, the history of the cause, and the general complexion of it, becomes material. I think both may be collected from the evidence of one of the witnesses; who has told us, that he entered into engagements with a noble lord, to advise his tenants, and to assist them in setting out their tithes; that one of the defendants by name, and eight others, delivered a notice in writing to the plaintiff, that they would set out their tithe milk every fifth day in the afternoon, and that the next meal would be due on the twenty-fifth day of April next; and the milk was accordingly set out every fifth evening. The purpose of setting out the tithe in the evening, and of so many different persons setting out their tithes on the same evening, is too obvious to be mistaken. The witness gravely tells us, that he was ordered to charge the tenants to play no tricks. Taking advantage of what he understood to be the letter of the law to injure the parson materially in his right, as well as to distress him as much as possible in the exercise of that right, I suppose this gentleman thought was no trick. But we are of opinion that this was [513]
a trick; disgraceful to the adviser of it, and reflecting no honour upon any one of the parties concerned in, or consenting to, it. Dr. Bosworth, feeling himself aggrieved by these manœuvres, has taken upon him to controvert this point of law; and he has succeeded under these circumstances, that though

the point of law might have been thought sufficiently disputable, if it had been fairly contested, to have excused the party failing from paying the costs of the suit, yet in this case, we are of opinion the costs ought to follow the right. The defendants are therefore to account for the tithe of milk *with costs.* (s)

Modus. 8. It hath been adjudged a good modus, in consideration of the payment of the tenth cheese made from the first of May, until the last of August, to be discharged from the tithe of milk; for this is not tithe in kind of part in discharge of the whole, for no tithe in kind is due of cheese, but only of milk, and so this is a good consideration. 1 *Roll's Abr.* 651. (2)

A custom, that every inhabitant in the parish, who kept cows there, had used time out of mind to set out the whole meal of milk upon the ninth day of May at night, and upon the tenth day of May in the morning, and so upon every ninth day then next following, until one lamb (to be yeaned in the year following) should be heard to bleat there, hath been adjudged an unreasonable custom; because in such case it might be contrived that lambs shall come so soon, as to deprive the parson of the tithe milk for a great part of the year. *L. Raym.* 358.

M. 1731. *Brinklow* and *Edmonds.* A bill was exhibited to establish several moduses in the parish of Newton Longville, in the county of Buckingham; one of which was, that tithe milk ought to be paid by every tenth evening and morning's meal in kind, from Hoe Monday to the second day of November, to commence upon the evening of Hoe Monday, (that is, the Monday [514] fortnight after Easter day,) and the morning following, to be taken by the rector at the place of milking, and no tithe milk to be paid for the residue of the year. But by the court, This is void upon the face of it, being only a payment of part for the whole. *Bunb.* 307.

[Milk is exempted from tithe by a custom, that the parson shall for so many weeks have the sole milking of all milch cows in the

(s) Affirmed on appeal to the house of lords. See 2 *Rayn.* 809. and 3 *Rayn.* 934. S. P. *Hutchins* v. *Full*, 3 *Rayn.* 945. 1004. 4 *Wood's D.* 155. 7 *Bro. P. C.* 78. By these cases it appears, that the parson is intitled to the tenth morning's meal of milk, and to the tenth evening's meal; [for as the evening's milk is invariably less than the morning's, they are considered as distinct tithable matters, from each of which a tenth may be counted.] But whether the tithe is to be set out by the tenth morning and evening, or by the tenth evening and morning, seems to depend on the first milking, *viz.* whether it be in the morning or evening. [And if in the evening, the great inconvenience of being deprived of two meals successively in one day, cannot occur. *Cullimore* v. *Bosworth*, 7 *Bro. P. C.* 57. *Tomlin's* ed.]

(2) This is a modus to pay part of the tithe for all of it in a more beneficial manner than the law prescribes; and is within *Hill* v. *Vaux*, 1 *Raym. R.* 358. 2 *Salk. R.* 656.

parish. (3) *Query*, If a custom to pay from April to November the tenth day's milk once skimmed and made into cheese in lieu of all tithe milk, is a good modus. (4)]

XIII. *Deer and Conies.*

1. Deer, being *feræ naturæ*, are not tithable without special custom. Deer.

But if tithe thereof be due by custom, it must be paid. [2 *Inst.* 651.]

2. Conies also, being *feræ naturæ*, are not tithable of common right. 1 *Roll's Abr.* 635. Conies: [see *ante*, p. 413.]

But tithes in kind, or a modus for them, may be by custom.

In the case of *Walton* and *Tryon*, *M.* 1751. A bill was brought by the plaintiff (amongst other things) for the tithe of rabbits, in a warren called Ashurst's warren. And he proved by the former incumbent's book, that the same had been compounded for, by payment of twenty shillings in money and four couple of rabbits. For the plaintiff it was argued, that it is a great question, whether this be a *prædial*, mixt, or personal tithe. Customary tithes are generally deemed personal tithes; and if so, then a payment in lieu of tithes will be good. Rabbits are of that nature, that they are difficult for the parson to get them, the times of taking them uncertain, and therefore a small composition probably was taken for them. Suppose a composition was made for hay, originally at five pounds; and afterwards a new agreement was made for four pounds, and one load of hay: this would be good, and an *assumpsit* would lie. The parson's book proves, that several couples were paid, and money also; and that book is always held to be good evidence. — For the defendant, it was answered, that this tithe can only depend on a customary immemorial right; and so ought to be laid in the bill. Here it is laid, to the tenth of the rabbits in kind; and the plaintiff demands it as such. But this evidence is directly contrary. For by that he proves a composition in lieu of tithes for them. Therefore as his evidence contradicts his manner of laying his prescription, he must fail in his suit. As to the rector's book in this case, it is very modern; for it goes no further back than the year 1728. [515] This indeed may be evidence of payment; but it can never be admitted as an evidence to support the right. —— By the lord chancellor *Hardwicke*: The plaintiff by his bill demands tithes in kind. But there is no evidence of that. The evidence offered is, that four couple of rabbits have always been sent and delivered at the parson's house by the warrener, and twenty shillings a year paid; and so proved by the former incumbent's book. And

(3) *Hill* v. *Harris*, 2 *Show. R.* 461.
(4) *Foy* v. *Lister*, 2 *Raym.* 1171. 2 *Salk. R.* 554.

the argument by the plaintiff from this evidence is, that this is a composition for tithes in kind; and rightly argued, for the modus would be too rank. But the great thing with me is, this twenty shillings a year. For the four couple of rabbits can neither be modus nor composition. Indeed, payment of part of a thing in money, and part in kind, has been held to be good. But I can determine nothing on this question: but it must go to be tried as to the custom.

XIV. *Fowl.*

Hens, ducks, geese. 1. Of fowls which are domestic, and not *feræ naturæ*, tithes are to be paid; as geese, hens, ducks: and the manner of tithing them is, either by paying the tenth egg, or the tenth of their young, according to the custom of the place, but not both; for where tithe of eggs is paid, there is no tithe of the young; and where the tithe of young is paid, there shall be no tithe of eggs. *God.* 405. *Deg. p.* 2. *c.* 11. [*Wats. Cl. L.* 3d *ed.* 563.]

Swans. 2. It is said that swans also, as being tame fowl, shall pay tithe. *Deg. p.* 2. *c.* 11.

Turkies. 3. In the case of *Houghton* and *Prince*, it was affirmed, that turkies are to be ranked amongst things that are *feræ naturæ*; and consequently not tithable. *Mo.* 599.

But in the case of *Carleton* and *Brightwell*, *T.* 1728; where tithes were demanded of turkies, and it was objected that turkies were things *feræ naturæ*, and not tithable any more than partridges, and that turkies were not brought hither from beyond sea before the time of queen Elizabeth; it was declared by the court, that it doth not appear but that turkies are birds as tame as hens, or other poultry, and therefore must pay tithes. 2 *P. W.* 462, 463. (5)

Pigeons. 4. It is said, that of pigeons sold, tithes ought to be paid; but not if they be spent in the house. 1 *Roll's Abr.* 635.

But by custom pigeons spent in the house may be tithable; though not of common right. 1 *Roll's Abr.* 642.

Partridges and pheasants. 5. If a man hath pheasants or partridges, and keepeth them in a place inclosed, and clips their wings, and from their eggs [516] hatcheth and bringeth up young pheasants or partridges; no tithe shall be paid of these eggs or young, because they are not reclaimed, but continue *feræ naturæ*, and would fly out of the inclosure, if their wings were not clipped. 1 *Roll's Abr.* 636.

(5) But if tithes be once paid of the eggs there can be no second demand for the chickens hatched. S. C. There may be a good modus to include turkies, though that bird has been introduced into this country within legal memory: as if there were a modus for "all domestic fowls." But *semb.* Not if the modus was distinctly and *eo nomine* for turkies. See 12 *East. R.* 35.

It hath been adjudged, that the paying of thirty eggs in Lent, is a good modus for all tithes of eggs: which seemeth to cross the rule of the law, that every modus ought to be somewhat, as to kind, different from the thing that is due. *Gibs.* 679. (6) Modus.

But it is to be considered, that this custom doth bind the parishioner to the payment of so many eggs whether he hath hens or not; so that he may be obliged to buy eggs, to pay the prescription; and this is what makes it a good custom: but if the custom had been, that he should pay thirty eggs of his own hens; the custom would have been ill. [*Hill* v. *Vaux*,] 1 *Ld. Raym.* 358.

XV. *Bees.*

Bees are reckoned amongst the things that are *feræ naturæ*, and by consequence tithe free; and it hath been adjudged, that they shall not be paid in kind by the tenth swarm. *Gibs.* 677.

But of the wax and honey of bees tithes shall be paid in kind *de jure*. 1 *Roll's Abr.* 635. [*Anon. Cro. Car.* 404.]

And that is, by the tenth measure of honey, and the tenth weight of wax. *God.* 389. *Deg. p.* 2. *c.* 7.

And there is a consultation provided in the register, for the tithe of honey and of the wax of bees.

XVI. *Mills, fishings, and other personal tithes.*

1. By the books of common law it appeareth, that some tithe or other is due for a mill. 2 *Inst.* 621. Mills.

The canonists hold, that this is a prædial tithe, and that the tenth toll dish ought to be paid for the same, without deduction of expences: but this doth not agree with the common law, and therefore is not binding. *Deg. p.* 2. *c.* 9.

In the case of *Dodson* and *Oliver*, *E.* 1721, in the exchequer; *Price* and *Montague* barons were of opinion that an ancient corn mill ought to pay the tenth toll dish, which being a tenth part of the thing itself, was a prædial tithe, and due of common right: But the chief baron *Bury* and baron *Page*, that it is a personal tithe, and not due of common right; and the mill not having paid, is now exempt by the statute of the 2 *Ed.* 6. So the court being divided, the plaintiff had no decree. *Bunb.* 73. [517]

But before this, in the case of *Newte* and *Chamberlain*, in the year 1706, it was decreed in the house of lords, on an appeal from the court of exchequer, that the tithes of a mill are personal tithes, contrary to several seeming authorities; and that in consequence of their being personal tithes, not the tenth of the toll,

(6) *Lee* v. *Collins*, 1 *Roll. Ab.* 648. (C. 3.)

or the tenth dish of the corn ground belongs to the parson, but the tenth part of the clear profits, after the charges of erecting the mill, and the other charges of servants, horses, and other expences, are deducted. *Vin.* tit. *Dismes*, M. a. (*t*)

And in the case of *Carleton* and *Brightwell*, *T.* 1728; a demand being made by the bill of the tithe of a corn mill, it was insisted, that every tenth toll dish was due. But it was replied, that this matter was determined in the aforesaid case of *Newte* and *Chamberlain*, in the house of lords, where a bill was brought for the tithes of a malt mill in Tiverton in Devonshire, and where the lords determined, with the assistance of eight judges (whereof Holt chief justice was one), that mills were tithable; but that the same was a personal tithe, and so ought to be paid out of the clear gain after all manner of charges and expences deducted: Upon which authority, the master of the rolls decreed the mill in question to pay tithes, but that they should be paid only as a personal tithe. 2 *P. Will.* 463. *Vin.* tit. *Dismes*, M. a.

By the statute of the 9 *Ed.* 2. *st.* 1. *c.* 5. If any do erect in his ground *a mill of new*, and afterwards the parson of the same place demandeth tithe for the same, *the king's prohibition shall not lie.*

A mill] This is only meant of a corn mill: for it hath been resolved, that fulling mills, tin mills, lead mills, plate mills, and the like, are not within this statute; nor is tithe due of such, otherwise than by custom. *Gibs.* 666. (7)

[518] *Of new*] Therefore all corn mills not erected before this statute are tithable. But because many mills since erected may be to us ancient, and their first erection not known, the rule of their discharge seemeth to be, that all such mills whose first

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(*t*) 1 *Bro. P. C.* 157. [1 *Eq. Ca. Abr.* 366. *Gwm.* 596. *Lagden and Robinson* v. *Green*, 1 *Hagg. R.* 501. S. P. *Filewood* v. *Kemp*, 1 *Hagg. R.* 494. *Gumley* v. *Falkingham*, 1 *Show.* 281. 4 *Mod.* 45. *Carth.* 251.] And in *Hall* v. *Macket*, *Macdonald* chief baron said, that the tithe of mills was to be considered as a prædial tithe, so far as regards its locality, and the person to whom it is payable; but in the mode of payment, it is to be treated as a personal tithe. [3 *Anstr. R.* 915.] 4 *Gwill.* 1460. [*Talbot* v. *May*, 3 *Atk. R.* 18. *Gaches* v. *Haynes*, 4 *Wood's D.* 588. That is, by paying the same once a year at or before Easter. 2 & 3 *Ed.* 6. *c.* 13. § 7.] And the tithe of the clear profit being only due, the rent is to be deducted; and in the case of a *new mill occupied by the owner*, a yearly value in the nature of a rent is to be set upon it and deducted. *Ib.* [The tithe owner is not intitled to call on the miller to state the price at which he has sold the meal ground at his mill; but in an answer to a bill for discovery of tithes, the miller must state the quantity of meal ground by him. *Chapman* v. *Pilcher*, 1 *Wightw. R.* 15.]

(7) *Dandridge* v. *Johnson*, *Cro. Jac.* 523. *Gwm.* 977. 2 *Roll. R.* 84. *Lit. R.* 314.

erection was before time of memory and is not otherwise known by matter of record, and have not been subject to the payment of tithes, shall be intended to be erected before the statute, and so to be tithe free. But as to mills for which tithes have been paid, and new mills; tithes must be paid for them. *Boh.* 127. (8)

Therefore when prohibitions are moved for to stay suits for tithes in the ecclesiastical court for ancient mills, it must not only be suggested that the mill is an ancient mill, but also that it hath never paid tithes; and the courts of common law do generally require an affidavit to be made of the truth of such suggestion, to wit, that the mill is ancient, and hath not within memory paid any tithes. *Boh.* 127. (9)

The king's prohibition shall not lie] *T.* 15 *Ja.* A prohibition was prayed to the spiritual court, upon a suggestion, that the parson libelled for tithes of a mill which was erected upon land discharged of tithes by the statute of monasteries, 31 *H.* 8. *c.* 13. And denied by the whole court: for of a mill erected of new, a prohibition lieth not. [*Anon.*] *Cro. Ja.* 429.

If there is a modus in lieu of all tithes issuing out of a messuage and an ancient water mill for corn, and a new water mill for corn is erected within the said messuage; or if the stream on which an ancient mill stood is diverted by the owner (and not by the act of God), and a new mill erected upon the new stream; they shall not be discharged by virtue of any former modus. 1 *Roll's Abr.* 641.

But if there hath been an ancient corn mill for which a modus hath been paid for time immemorial, and afterwards by continuance of time the mill stream changeth its course, and goeth in a place a little distant from the ancient stream, and thereupon the owner of the mill pulleth it down, and rebuildeth it in the new place where the stream now runneth; this shall be discharged of tithes by force of the ancient modus, for this cometh by the act of God, and not by the act of the party. 1 *Roll's Abr.* 641.

It is said in *Carth.* 215. that adding new stones to ancient mills will not alter the modus, nor destroy it, where the stones are under the same roof. But by lord *Hardwicke*, in the case of *Talbot* and *May*, Dec. 17. 1743; This to all intents and purposes is two mills, and the latter cannot be covered under the modus: you might as well say he might erect another mill upon the same stream, and call it one mill. 3 *Atk.* 17. (1) [519]

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(8) 1 *Inst.* 621. *Wilson* v. *Mason, Gwm.* 974. 3 *Wood's D.* 285. And see *Thomas* v. *Price, Gwm.* 871. The tithe owner must *shew* that the mill has been accustomed to pay tithe: for the court will otherwise presume it to be an ancient mill. *Hughes* v. *Billinghurst, Gwm.* 644.

(9) *Dart* v. *Hall*, 1 *Ld. Raym.* 441. S.P.

(1) *Gwm.* 782. And in *Manby* v. *Miller*, 3 *Ves. & B.* 71., where an

But if the surmise be of a certain rate or modus for all mills erected and to be erected, and a mill there appears to be new; the modus cannot extend to it, by reason of the statute aforesaid. [*Jakes*'s case,] 3 *Bulst.* 212. (2)

[Fish.] 2. It doth not seem to be agreed, whether or how far fish in *ponds* or private fisheries are liable to pay tithes; and therefore the same must be referred to the customs of particular places.

But it seems that of these no tithe can be due, where no profit is made thereof, and where they are kept only for pleasure, or to be spent in the house or family; as fish kept in a pond generally are. *Boh.* 135. (3)

Also fish taken in common *rivers* are tithable only by custom. *God.* 406. *Wood. b.* 2. *c.* 2.

And in this case *Lindwood* says, it is only a personal tithe, and shall be paid to that church where he who taketh them heareth divine service and receiveth the sacraments. *Lindw.* 195.

Where fish are taken in the *sea*, though they are *feræ naturæ*, and consequently not tithable of common right, yet by the custom of the realm they are tithable as a personal tithe; that is, not by the tenth fish, or in kind, but by some small sum of money in consideration of the profits made thereby after costs deducted. 1 *Roll's Abr.* 636. (*u*) [*Gibs. Cod.* 679. *Degge, c.* 8. 261.]

Upon which foundation, it is said, that if the owners of a ship do lend it to mariners to go to an island for fish, and are in consideration of such loan to have a certain quantity of fish when they come back; no tithe shall be paid by the mariners for what

ancient corn mill was rebuilt, and two pair of new stones added, it was held tithable, and an account decreed.

(2) If ancient mills fall and are rebuilt on their old foundations, the discharge will revive. *Gwm.* 130. *in notis.* Nor will an ancient corn mill lose its exemption by being occasionally used in another capacity as a lead mill; for the mill itself is the substance of the thing exempted. See *Gwm.* 974. *Hicks* v. *Triese*, *Gwm.* 1022. 3 *Wood's D.* 363. But, when the exemption from tithe is suspended, and the mill is converted into a corn mill, the right to tithe revives. *Brown's* case, *Godb. R.* 194. *Hooper* v. *Andrews*, 1 *Rol. R.* 121. *Manby* v. *Taylor*, 2 *Ves. & Bea. R.* 71.

(3) In *Nicholas* v. *Elliott*, *Gwm.* 1581., it was resolved that, without a custom, fish caught in a pond and sold are not tithable.

(*u*) See *The King* v. *Carlyon*, 3 *T. Rep.* 385. Where it appears to be the custom in the parish of Paul in the county of Cornwall, to pay one tenth of all the fish caught and brought on shore within the parish; and where the court held, that the proprietors of this tithe were rateable to the poor in respect of it. For more of this custom, see [*Gweavas* v. *Kelynac*,] *Bunb.* 13. 239. 256. [And 2 & 3 *Ed.* 6. *c.* 13. § 11. in *page* 520.]

is given to the owners, because they are only to pay for the clear gain. *Gibs.* 679. [Citing 1 *Rol. Abr.* 656.] (4)

3. By a constitution of archbishop Winchelsea, it is ordained, that personal tithes shall be paid of artificers and merchandizers, that is, of the gain of their commerce: as also of carpenters, smiths, masons, weavers, innkeepers, and all other workmen and hirelings, that they pay tithes of their wages, unless such hireling shall give something in certain to the use or for the lights of the church, if the rector shall so think proper: *i. e.* they shall pay the tenth part of the profit, deducting first all necessary and reasonable expences. *Lind.* 195.

Other personal tithes.

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And by the *statute* of the 2 & 3 *Ed.* 6. *c.* 13. Every person exercising merchandizes, bargaining and selling, clothing, handicraft, or other art or faculty by such kind of persons, and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as be common day labourers), shall yearly at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains: his charges and expences, according to his estate, condition, or degree, to be therein abated, allowed, and deducted. § 7.

Provided, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and continue. § 8.

And if any person refuse to pay his personal tithes in form aforesaid, it shall be lawful to the ordinary of the diocese where the party is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, *other than by the party's own corporal oath* (5), concerning the true payment of the said personal tithes. § 9.

Provided, that nothing in this act shall extend to any parish

(4) But by custom tithe of fish, whether taken in the sea, in an enclosed or open river, in a wear or fishery, may be payable in kind to the tithe owner of that parish wherein they are landed and sold. Less than the tenth may be due; *e. g.* a payment of the eleventh, twelfth, and twentieth fish. In Wales, Yarmouth, Cornwall, and elsewhere, all kinds of fish caught in the sea and other places are frequently tithable; and in Ireland it is a very common custom to pay the tithe of salmon taken in rivers in kind. *Mirch. on Tithes*, 96.

(5) Thus a person is not obliged to discover what are the gains of his trade and the profits of every speculation he may enter into; a circumstance that would necessarily lead to the greatest inconvenience. See *Randall* v. *Head*, *Hardr. R.* 188. An innkeeper is not chargeable with tithe for the profits of his kitchen, &c. *Wood's Inst.* 174. 2 *Woodd. V. L.* 22. 89. Nor can the *turpe lucrum* of robbery or gaming be thus estimated. *Dolley* v. *Davies*, 2 *Bulstr. R.* 141. The lawyer and physician would require a strong custom to be made out against them before they would yield the tithe of their fees. *Norton* v. *Clark*, *Gwm.* 428.

which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfy their tithes by fish; but that all such parishes shall pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid. § 11.

Provided also, that nothing in this act shall extend in any wise to the inhabitants of the cities of London and Canterbury, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act. § 12.

This act restrains the canon law in three things: First, where the canon law was general, that all persons in all places should pay their personal tithes, the act restraineth it to such kind of persons only as have accustomably used to pay the same within forty years before the making of the act. Secondly, whereas by the ecclesiastical laws they might before this act have examined the party upon his oath concerning his gain; this act restrains [521] that course, so that the party cannot be examined upon oath. Thirdly, by this act the day labourer is freed from the payment of his personal tithes. *Deg. p.* 2. *c.* 22. [1 *Rol. Ab.* 646.]

It cannot be intended upon this act, that if such tithes have been sometimes paid within forty years, they are therefore due; but they must have been *accustomably*, that is, constantly paid for forty years next before the act. *Deg. p.* 2. *c.* 22.

If it be demanded, how such payment must now be proved forty years before the making of the act; the answer is, as in other like cases, *a posteriori:* by what has been done all the time of memory since the act. *Deg. p.* 2. *c.* 22.

Sir Simon Degge says, the only case that he could find for above a hundred years before his time, where the tithes of the profits of such trades were sued for by any clergyman, was that of *Dolley* and *Davis*, *M.* 11 *Ja.*, which was thus: The parson of a parish in Bristol libelled in the spiritual court against an innkeeper, to have tithes of the profits of his kitchen, stable, and wine cellar, and did set forth in his libel, that he made great gain in selling of his beer, having bought it for 500*l.* and sold it for 1000*l.*, of which gain he ought to have tithe by the common law of the realm. Upon which occasion, the clerk of the papers informed the court, that when one had libelled for tithes of the gain of 10*l.* for 100*l.* put out, a prohibition was granted: and the same was also granted in this case. 2 *Bulst.* 141.

And personal tithes are now scarce any where paid in England, unless for mills, or fish caught at sea; and then payable where the party hears divine service, and receives the sacrament. *Wood. b.* 2. *c.* 22.

[XVII. *Marriage goods in Wales.*

By 2 & 3 *Ed.*6. *c.* 13. § 6. It is enacted, that where such custom hath been in many parts of Wales, that of such goods as have been given with the marriage of any person, the tithes have been exacted by the parsons or curates, no such tithes shall be exacted.]

VI. *Of the setting out, and the manner of taking and carrying away of tithes.*

General manner of setting out. (6)

1. By a constitution of archbishop Winchelsea, it is ordained as follows: Because by reason of divers customs in the taking of tithes throughout divers churches, quarrels, contentions, scandals, and very great hatreds *between the rectors of the churches* and their parishioners do oftentimes arise; we will and ordain, that in all the churches established *throughout the province* of Canterbury, there be one uniform taking of tithes *and profits of the churches*. Lind. 192. [522]

Between the rectors of churches] Which is to be understood also of vicars, where the tithes belong to their portion. *Lind.* 192.

Throughout the province] *Per provinciam:* Lindwood says, in some copies it was *archiepiscopatum* (as also it was in archbishop Grey's constitutions, from whence this was taken); but in a provincial council held at London under archbishop Chichely, the word *archiepiscopatum* by consent of the prelates and the whole clergy was taken away, and *provinciam* inserted in its place; Lindwood himself being then prolocutor. *Lind.* 192.

And profits of the church] That is, which do not consist in tithes: as, oblations, mortuaries, and such like. *Lind.* 122.

But notwithstanding the canon, the manner or form of setting out or payment of tithes is for the most part governed by the custom of the place.

Hall v. *Macket and others* (1797). In this case one of the defendants occupied a meadow of *nine acres*, which he cut down at four several times, and set out the tithe of each cutting separately, as it was cut. The plaintiff objected, that cutting down so small a field at four different times could only be justified

(6) The principle of setting out tithes is thus laid down by the judges in *Knight* v. *Halsey, Dom. Proc.* 2 *B.* & *P. R.* 196. 7 *T. R.* 86. *Gwm.* 1554. S. C. "The right of the parson to his tithes in kind accrues on the act of severance: his right to *take* the tithe accrues when the tithable matter after severance is in the earliest stage of the course of husbandry applicable to it, in which the tenth part may be easily distinguished from the other nine." And again, by the C. B. in *Collyer* v. *Howes*, 3 *Anstr. R.* 954. *Gwm.* 1490. S. C. "The general and irrefragable law of tithing is, that each article is to be tithed when it comes into such a state of severance that the parson may see whether he has his fair tenth. The stage of the process in which that object is best attained marks the time of tithing."

from absolute necessity, as it gave so much trouble to the clergyman. Court held, that a farmer may cut down a field in any portions most convenient to himself, provided he set out the tithe of all cut down at any one time, before any part of it is carried away, and provided it be not done vexatiously. 4 *Gwill.* 1460. (7)

Not before the crop is cut.

2. If the owner will not cut his crop before it be spoiled, the parson is without remedy. *God.* 394.

Parson may not set it out.

3. The parson, vicar, impropriator, or farmer, cannot come himself and set forth his tithes, without the licence and consent of the owner; for if he shall of his own head tithe the corn or hay of any landholder within his parish, and carry it away, he is a trespasser, and an action will lie against him for it. *Deg. p.* 2. *c.* 14. [*Gwm.* 562. *Anon.* 2 *Show. R.* 184.]

Yet he may see it set out.

4. But every person is bound, of common right, to cut down, and set out the tithes of his own lands. And that it may be done faithfully and without fraud, the laws of the church intitle the parson to have notice given him: but by the declaration of the common law, such notice is not necessary. (8) Yet nevertheless, the common law declareth a custom of tithing without view to be an absurd custom (*x*): And by the statute of 2 & 3 *Ed.* 6. *c.* 13.
[523] [§ 2.] it is enacted, that at all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said

(7) 3 *Anstr.* 915. S. C.: and see *Erskine* v. *Ruffle*, *Gwm.* 961. A reasonable quantity must be cut down before tithing, *ib.*; and in general all the produce so cut down in a field should be tithed before any part of it is carried away; and this was so held in one extreme case, where the uncertainty of the weather prevented it from being put in shock at all, and it was cut and carried in small quantities, throwing out the tenth sheaf. *Franklyn* v. *Goch*, 3 *Anstr. R.* 682, 683. *Gwm.* 1441. But where there is nothing like fraud or vexation, and in cases of necessity, as from variable weather or partial ripeness, this rule may be dispensed with. Nor is an occupier obliged to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish; and where a farmer in doubtful weather carried from a part of a field which was tithed in one parish the day before the rest of the field in that parish was tithed, this being done *bonâ fide* was held lawful. *Leathes* v. *Levinson*, 12 *East*, 239.

(8) *Gale* v. *Ewer* (1696), 1 *Com. R.* 23. 12 *Mod.* 117.

(*x*) Being *absque visu et tactu.* 6 *Com. Dig.* 303. See *Boughton* v. *Wright*, *Bunb.* 186. In *Erskine* v. *Ruffle*, [*Gwm.* 961.] 5 *Bac. Ab.* 74. & 75., the court of exchequer held, contrary to a former opinion, that it is not necessary to cut down all the corn growing in a field before the tithe of any part can be set out, but that the tithe may be set out as often as a reasonable quantity is cut down. And that unless there be a custom of the parish to set out the tithe of barley in some other manner, it must be gathered into cocks, and every tenth cock set out for tithes.

tithes to be justly and truly set forth and severed from the nine parts. [The tithe owner should therefore have an opportunity of seeing them separated from the other nine parts, so as to be able to compare the one with the other (*y*); and to judge whether or not the tithes are fairly set out (9): and it is a fraud within the statute, though the tithe is fairly set out, if the rest is immediately carried away. (1) He may do this without previous notice of the time of the severance. But a *custom* of giving *notice of setting out tithes* is good; and where it prevails, is the law of the land in that parish. (2) It must afford reasonable time, so as to give the rector a sufficient opportunity of taking a view. (3) Thus in *Tennant* v. *Stubbin* (4) *an hour*'s notice was held not to be reasonable; for in the middle of summer the tithe owner may be engaged in tithing other fields or farms perhaps at the extremity of the parish. Reasonableness of notice must depend on distance and other circumstances; and though a notice for a time when the corn is not ready is void, yet the variation must be material, and not merely a small delay, which will occur in all business. (5)]

E. 6 *G.* 3. *Butter* and *Heathby*. An action upon the case was brought against the defendant, for not fetching away his tithes in a reasonable time. (*z*) The declaration states, that the plaintiff set out the tithes, and the defendant refused to fetch them away. At the trial the defendant's counsel insisted on a custom in the parish, that notice should be given to the owner of the tithes of the setting them out. The judge who tried the cause held the custom not to be a good one; and a verdict was found for the plaintiff, subject to the opinion of the court of king's bench, upon the following question, *viz.* whether the custom be good in law or not. A motion had been made for a new trial and a rule to shew cause. The counsel for the plaintiff denied this to be a good custom; because it was only setting up the [Notice of setting out.]

(*y*) [*Wilson* v. *Bp. of Carlisle*, *Hob. R.* 107. *Shallcross* v. *Jowle*, 13 *East. R.* 261.] *Tennant* v. *Stubbin*, in Exchequer, *M.* 1795. [3 *Anstr.* 640. *Gwm.* 1441.] The defendants insisted on a customary mode of tithing wheat, the tithes being never set out till the corn was about to be carried, and then every tenth sheaf, as it came to the fork, to be thrown aside for the rector: notice of the intention to carry was to be given to him, and he might, if he disliked the tenth sheaf, take the eleventh in its stead. The custom was held bad; for the rector has a right in all cases to see the tithes set out, that he may compare them with the nine parts.

(9) *Boughton* v. *Wright*, *Bunb. R.* 186. *Thomas* v. *Rees*, *Gwm.* 796.

(1) *Heale* v. *Sprat*, 2 *Inst.* 649.

(2) *Helmar* v. *Trist*, 3 *Wood's D.* 128.

(3) *Filewood* v. *Marsh*, 1 *Hagg. Rep.* 478.

(4) 3 *Anstr. R.* 640. *Gwm.* 1441.

(5) *Filewood* v. *Marsh*.

(*z*) Vid. *infra*, 9.

ecclesiastical law against the common law of the kingdom, which cannot be done by custom in any particular district. By Mr. Justice *Wilmot:* By the common law no notice is necessary. By the ecclesiastical law it is necessary. The question therefore is, whether the ecclesiastical law can be introduced under the notion of such a custom. — This was agreed to be the question. — The plaintiff's counsel objected, that this custom is not a reasonable or good one; because it is not founded upon any consideration. The farmer can receive no benefit by giving such notice: on the contrary, he may be much incommoded by being bound down to set them out at the particular time notified. Indeed, notice to the owner of the tithes, or of their having been set out, is previously necessary to the bringing an action for not carrying them away: And this notice was given. — The counsel for the defendant, who argued in support of the rule for a new trial, admitted that the common law doth not require the notice of setting them out: But this custom does require it; and they insisted that it is a good custom. The consideration of customs cannot be inquired into: However, if it were necessary to do so, honesty and piety are sufficient considerations for this
[524] custom. But customs must be presumed to have sprung from good considerations. This custom prevails in half the parishes in the west of England. And as tithes depend in a great measure upon custom, so also does the manner of setting them out. In a cause at Nisi Prius, in the case of one *Yarborough*, at Lincoln assizes, lord chief justice *Willes* held such a custom to be good, and said he wished it were the law of the land. — After having taken time to consider of it, lord *Mansfield* delivered the opinion of the court: The only question is, whether this be a reasonable custom or not. There is no authority that comes up to this point but one; and that was a cause on the midland circuit before lord chief justice Willes, who thought it a reasonable custom. I think so to. I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatever, lest the clergy should introduce it by degrees. It is reasonable, as promotive of justice, and preventive of fraud. Mr. Dunning said, as of his own knowledge, that there were such customs in the west of England: and I am told there are such in Lincolnshire. We are all clear, that it is a good custom. It is for the prevention of fraud, and for the convenience of the parties. Therefore the rule must be made absolute for a new trial. *3 Burr.* 1891. (6)

Must take care of it, after it is set out.

5. The care of the tithes, as to waste or spoiling, after severance, rests upon the parson, and not upon the owner of the land. For

(6) See *Spencer*'s case, *Noy's R.* 19. *Gale* v. *Ewer*, 1 *Com. R.* 23. *Anon.* 2 *Ventr.* 48.

it seemeth that the parson is at his peril to take notice of the tithes being set out; and so it hath been declared, that although the parishioner ought *de jure* to reap the corn, yet he is not bound to guard the tithes of the parson. *Gibs.* 689.

And the right to the tithes vests in the parson immediately on severance, so that if he execute a lease of them on a day *subsequent* to their severance, but *previous* to their being carried away by the land-holder, the lessee cannot maintain an action for them. (7)

6. But after the tithes are set forth, he may of common right come himself, or his servants, and spread abroad, dry, and stack his corn, hay, or the like, in any convenient place or places upon the ground where the same grew, till it be sufficiently weathered and fit to be carried into the barn. But he must not take a longer time for the doing thereof than what is convenient and necessary; and what shall be deemed a convenient and necessary time, the law doth not nor can define; for the quantity of the corn or hay, and the weather, in this case are to be considered; and what shall in this, and all other cases of like nature be said to be a reasonable and convenient time, is to be determined by the jury, if the point come in issue triable by a jury; but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cause depends are to resolve the same. *Deg. p.* 2. *c.* 14. *Str.* 245. (8) [525]

May spread and dry it upon the ground.

7. And it shall be lawful quietly to take and carry the same away. And [by *stat.* 2 & 3 *Ed.* 6. *c.* 13. § 2.] "if any person "carry away his corn or hay, or his other prædial tithes, before "the tithe thereof be set forth; or willingly withdraw his tithes of "the same, or of such other things whereof prædial tithes ought "to be paid; and if any person do stop or let the parson, vicar, "proprietor, owner, or other their deputies or farmers to view, "take, and carry away their tithes as is abovesaid; he shall for"feit double value, with costs; to be recovered in the ecclesias"tical court." [According to the ecclesiastical laws.]

And carry it away.

And he may carry his tithes from the ground where they grew, either by the common way, or any such way as the owner of the land useth to carry away his nine parts. But if there are more ways than one, and the question is, which is the right way; this is cognizable in the temporal court. *Deg. p.* 2. *c.* 14.

[In the case of *Cobb* v. *Selby*, it was held, that the parson is not intitled to carry his tithes home by *every* road which the farmer himself uses for the occupation of his farm; but, *semble*, he may

(7) And see *Welch* v. *Uphill*, 1 *B. & B. Rep.* 84. 3 *B. Moore, R.* 330. *Wyburd* v. *Tuck*, 1 *Bos. & Pul.* 458. (7)

(8) *South* v. *Jones*, 1 *Roll. Ab.* 643. See *infra*, 9.

so that road which the farmer uses for the occupation of the field in which the tithe grows. (9)]

And if the owner of the soil, after he hath duly set forth his tithes, will stop up the ways, and not suffer the parson to carry away his tithes, or to spread, dry, and stack them upon the land; this is no good setting forth of his tithes without fraud within the statute: but the parson may have an action upon the said statute, and may recover the treble value; or may have an action upon the case for such disturbance, as it seemeth; or he may, if he will, break open the gate or fence which hinders him, and carry away his tithes. *Deg. p.2. c.14.* (1)

But must not do wilful damage.

8. But in this he must be cautious that he commit no riot, nor break any gate, rails, lock, or hedges, more than necessarily he must for his passage. *Deg. p.2. c.14.* (2)

[526]

And when he comes with his carts, teams, or other carriages, to carry away his tithes; he must not suffer his horses or oxen to eat and depasture the grass growing in the grounds where the tithes arise, much less the corn there growing or cut: but if his cattle (as cannot be avoided) do in their passage against the will of the drivers, here and there snatch some of the grass, this is excusable. *Deg. p.2. c.14.*

Penalty on not carrying it away.

9. It seems, that if tithes set forth remain too long upon the land, the owner of the soil may take them damage feasant (3);

(9) 2 *New R.* 169. 6 *Esp. C. N. P.* 103. Again, he may not pass through a private road on another's land, though that may be nearest for conveying his tithes. If lands formerly in one occupation become occupied by several, the right to use what was the road before there was a separation will not necessarily continue after it; for the tithe owner can only use for each occupier's tithe the road the occupier uses. *Bosworth* v. *Limbrick, Gwm.* 1109. In collecting tithes he need not unload his waggon before driving it on the ground of each parishioner. *Lake* v. *Bruton, Gwm.* 775.

(1) A rector is not "let or stopped" within 2 & 3 *Ed.* 6. *c.* 13. § 2. in carrying away his tithes by the parishioner's stopping up an old gateway for his own convenience, before the tithes were set out, and opening another, by which he carried away his crops; nor by resistance to his pulling down the fence in asserting a right to the old way; no vexatious intention being proved. *Burnell* v. *Jenkins, 2 Phill. Rep.* 391. *Degge, p.* 2. *c.* 14. Where there is a private road through a farm used by the owner for agricultural and other purposes, the parson may use it for carrying away his tithe, though there is a public road, nearly equally convenient, and the farmer does not on that particular occasion use the private road himself. *Cobb*, clerk, v. *Selby*, 6 *Esp. N. P. C.* 103. *Macdonald* C. B. *Maidstone*, 1806.

(2) *Hampton* v. *Courtney*, 1 *Bulst. R.* 108.

(3) Doubted by *Wood* B. in *Baker* v. *Leathes, Wightw. R.* 113.; and see *Godolph. R.* 362.

but then, if he be sued for them, in order to justify, he must set forth how long they had remained before he took them; and when they shall be said to remain too long is triable by the jury. *Wats. c.* 54. [And see *Mountford* v. *Sidley*, 3 *Bulst. R.* 336. *Gwm.* 424.]

[Action on the case against the parson.]

Or an action upon the case will lie against the parson for his negligence in this behalf: but no action in such case will lie, unless the parishioner hath duly set forth his tithes, and hath also given notice to the parson that they are so set forth. *Deg. p.* 2. *c.* 14. *L. Raym.* 187. (*a*)

But the occupier of the ground cannot put in his cattle and destroy the corn or other tithe: for that is to make himself a judge what shall be deemed a convenient time for taking it away; [and to permit this to be done might be a much greater loss to the tithe owner than the occupier might sustain by the continuance of the tithe on the land.] But the court and jury, upon an action brought, are to determine of the reasonableness of the time, and of the recompence to be made for the injury sustained. *L. Raym.* 189. (*b*)

VII. *Tithes how to be recovered.*

Incumbent compelled to demand

1. That tithes may not be lost to the successors, it is injoined by a constitution of archbishop *Winchelsea*, that the rectors and vicars of churches, who, respecting the fear or favour of men more than the fear of God, shall not demand their tithes with effect, shall be suspended until they pay half a mark of silver to the archdeacon for their disobedience. *Lind.* 191.

(*a*) [*Shaprott* v. *Mudford*; and see *Butler* v. *Heathby*, 3 *Burr. R.* 1892. *supra*, 4. *Com. Dig.* tit. *Dismes* (L. 3.) *Chase* v. *Ware*, *Rol. Ab.* 613. *pl.* 30. *Style*, 212. *Anon. Ventr.* 48.; but he need not *allege* such notice; and see] 3 *Burr.* 1892. *supra*, 1. For the grounds of this action, see *Wiseman* v. *Denham*, 2 *Roll. Rep.* 328. [Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden, which were accordingly set out on the day specified, but were not removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner to remove the tithed fruits and vegetables within two days, or that an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action if they are not removed:—And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between 11th and 16th Sept. a general notice on the 17th to the parson to take away *all the tithes of* (plaintiff's) *lands* within two days, is sufficient whereon to found the like action. *Kemp* v. *Filewood*, 11 *East, R.* 358.]

(*b*) *Williams* v. *Ladner*, 8 *Term. Rep.* 72. [*Gale* v. *Ewer*, 1 *Com. R.* 23. 12 *Mod.* 117.]

Who to be sued. 2. The general rule is, that the owner of the nine parts is to be sued for the tenth. But this rule admits of divers exceptions: As,

[527] First, If a parishioner let his ground of herbage, it is said, that the parson may sue either the owner of the ground or the owner of the cattle, at his election, for the tithe, if the custom be not against it. *God.* 413.

But in the case of *Fisher* and *Lemen*, where cattle were depastured occasionally in another man's ground, it was agreed by the whole court of exchequer, that the owner of the land, and not the owner of the cattle, was to pay the tithes: And baron *Page* said, that as to what had been said, that the demand might be either against occupier or agister, that could not be; for the same duty could not arise in two different persons at the same time. *Viner*, *Dismes*, *L. a.* [See *ante*, 475.]

So, if hay be put into ricks on the ground, and after sold; the buyer cannot be sued for the tithe, but the seller may, in case the tithe thereof was not paid before. *God.* 412.

But if one sells underwood standing, or corn or grass on the ground; the buyer, and not the seller, shall pay the tithes. *Boh.* 158.

But if any part thereof be cut before the sale, the seller must answer the tithe thereof. *Boh.* 159.

So where one sells sheep, whereof the parson is to have a rate tithe; the seller, and not the buyer, must pay the tithe for them. *Boh.* 158.

So if one that is owner of a coppice of wood do cut it down and sell it altogether; in this case the seller, and not the buyer, must answer for the tithes. *Boh.* 159.

If cattle or other goods tithable be pawned or pledged, it is said, that he to whom they are pledged must pay tithe of them. *Boh.* 159.

But if a man deliver cattle or goods to one, to be re-delivered to him; he himself, and not the person to whom they are delivered, must pay tithe for them. *Boh.* 159.

If a parishioner die before he pay his tithes; his executor, if he hath assets, must pay them. *Boh.* 159.

To whom to be paid, where the parish is not known. 3. By the 2 & 3 *Ed.* 6. *c.* 13. Every person who shall have any beasts or other cattle tithable, going, feeding, nor depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay tithes for the increase of the said cattle so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies, of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth. § 3.

[528] Anciently 4. In the Saxon times, tithes were recoverable in the county court, where the bishop or his deputy, and the sheriff, did sit as

co-ordinate judges, there being at that time no separate court of ordinary ecclesiastical jurisdiction. 2 *Inst.* 661.

recoverable in the county court.

5. By a constitution of archbishop *Winchelsea:* Forasmuch as many are found, who are not willing freely to pay their tithes; we do ordain, that the parishioners be admonished once, twice, and thrice to pay their tithes to God and the church. And if they do not amend, they shall first be suspended from the entrance of the church, and so at last be compelled to pay their tithes by censures ecclesiastical, if it shall be necessary. And if they shall desire a relaxation or absolution of the said suspension, they shall be remitted to the ordinary of the place to be absolved and punished in due manner. *Lindw.* 191.

Recoverable in the spiritual court; by the canon law, and by divers statutes. [See Judicavit, and note there.]

By the statute of *circumspecte agatis*, 13 *Ed.* 1. *st.* 4. The king to his judges sendeth greeting: Use yourselves circumspectly in all matters concerning the clergy, not punishing them if they hold plea in court christian, in the case where a parson doth demand of his parishioners oblation or tithes *due and accustomed:* In which case, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

Due and accustomed] *Debitas* vel *consuetas:* By this act, lord *Coke* says, *modus decimandi* and real composition are *established* [perhaps he had better have said, *distinguished;* for both of them were established long enough before this act]: for hereby tithes are divided into two parts, *viz.* tithes *due*, which is the tenth part; and tithes *accustomed*, which is a duty personal, due by custom and usage to the parson in satisfaction of tithes, as a yearly sum of money or other duty. And these are here called tithes *accustomed;* and for this *modus decimandi* the parson may sue in court christian, and is warranted by this act. 2 *Inst.* 490.

By the statute of *articuli cleri*, 9 *Ed.* 2. *st.* 1. *c.* 1. Whereas laymen do purchase prohibitions generally upon tithes, obventions, oblations, mortuaries; the king doth answer to this article, that in *tithes*, *oblations*, *obventions*, *mortuaries*, (when they are propounded under these names,) the king's prohibition shall hold no place, although for the long withholding of the same the money may be esteemed at a sum certain. But if a clerk or a religious man do sell his tithes, being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the king's prohibition shall lie; for by the sale, the spiritual goods are made temporal, and the tithes [529] turned into chattels.

By the 18 *Ed.* 3. *st.* 3. *c.* 7. Whereas *writs of scire facias* have been granted *to warn prelates, religious, and other clerks*, to answer *dismes* in our chancery, and to shew if they have any thing, or can any thing say, wherefore such *dismes* ought not to be restored to the said demandants, and to answer as well to us as to the party such *dismes;* such writs from henceforth shall

not be granted, and the process hanging upon such writs shall be annulled and repealed, and the parties dismissed from the secular judges of such manner of pleas.

Writs of scire facias] This is a writ, where one hath recovered debts or damages in the king's courts, and sueth not for execution within a year and a day; after which he shall have this writ, to warn the party; who coming not or saying nothing to stay execution, a writ of *fieri facias* goes, commanding the sheriff to levy the debts or damages of his goods. *Terms of the Law.*

To warn prelates, religious, and other clerks] This *scire facias* was not brought against the possessors of the land for subtraction of tithes, but against the prelates or other clerks which took the tithes after they were severed. Commissions out of the chancery were directed to certain persons, giving them authority to inquire whether such a spiritual person ought to have tithes of such lands; whereupon inquisitions were taken and returned: and if it were found for the spiritual person, upon this record he might have a *scire facias* against any prelate, religious, or other clerk that took them after severance. 2 *Inst.* 640.

By the 1 *Ric.* 2. *c.* 13. The prelates and clergy of this realm do greatly complain them, for that the people of holy church, pursuing in the spiritual court for their tithes, and their other things which of right ought and of old times were wont to pertain to the same spiritual court; and that the judges of holy church, having cognizance in such causes, and other persons thereof meddling according to the law, be maliciously and unduly for this cause indicted, imprisoned, and by secular power horribly oppressed, and also inforced with violence by oaths and grievous obligations, and many other means unduly compelled to desist and cease utterly of the things aforesaid, against the liberties and franchises of holy church: Wherefore it is assented, that all such obligations made or to be made by duress or violence shall be of no value. And as to those that by malice do procure such indictments, and to be the same indictors, after the same
[530] indictees be so acquit; such procurers shall suffer a year's imprisonment, and restore to the parties their damages, and shall nevertheless make a grievous fine unto the king. And the justices of assize, or other justices, before whom such indictees shall be acquit, shall have power to inquire of such procurers and indictors, and duly to punish them according to their desert.

By the 1 *Ric.* 2. *c.* 14. At what time that any person of the holy church be drawn in plea in the secular court, for his own tithes taken by the name of goods taken away; and he which is so drawn in plea maketh an exception, or allegeth that the substance and suit of the business is only upon tithes due of right and of possession to his church or other his benefice: in

such case the general averment shall not be taken, without shewing specially how the same was his lay chattel.

By the statute 27 *H.* 8. *c.*20. When by the noise of the dissolution of monasteries in this parliament, laymen took occasion upon trifling pretences to withdraw their tithes, it was enacted as followeth: Forasmuch as divers evil-disposed persons, inhabited in sundry counties, cities, towns, and places of this realm, having no respect to their duties to Almighty God, but against right and good conscience having attempted to subtract and withhold in some places the whole, and in some places great part of their *tithes and oblations, as well personal as prædial,* due unto God and holy church; and pursuing such their detestable enormities and injuries, have attempted in late time past to disobey and contemn the process, laws, and decrees, of the ecclesiastical courts of this realm, in more temerarious and large manner than before this time hath been seen: for reformation of which said injuries, and for unity and peace to be preserved amongst the king's subjects of this realm, our sovereign lord the king, being supreme head on earth (under God) of the church of England, willing the spiritual rights and duties of that church to be preserved, continued, and maintained, hath ordained and enacted by authority of this present parliament, That every of his subjects of this realm, according to the ecclesiastical laws and ordinances of his church of England, and after the laudable uses and customs of the parish or other place where he dwelleth or occupieth, shall yield and pay his *tithes and offerings, and other duties of holy church;* and that for such subtractions of any the said tithes and offerings, or other duties, the parson, vicar, curate, or other party in that behalf grieved, may by due process of the king's ecclesiastical laws of the church of England, convent the person offending, before his ordinary or other competent judge of this realm, having authority to hear and determine the right of tithes, as also to compel the same person offending to do and yield his duty in that behalf: And in case the ordinary of the diocese or his commissary, or the archdeacon or his official, or any other competent judge aforesaid, for any contempt, contumacy, disobedience, or other misdemeanor of the party defend- [531] ant, shall make information and request to any of the king's most honourable council, or to the justices of the peace of the shire where such offender dwelleth, to assist and aid the same ordinary, commissary, archdeacon, official, or judge, to order or reform any such person in any cause before rehearsed; that then he of the king's said honourable council, or such two justices of the peace (whereof one to be of the quorum), to whom such information or request shall be made, *shall have power to attach* or cause to be attached, the person against whom such information or request shall be made, and to commit him to

ward, there to remain without bail or mainprize until he shall have found sufficient surety, to be bound by recognizance or otherwise before the king's said counsellor or justice of the peace, or any other like counsellor or justice of the peace, to the use of our said lord the king, to give due obedience to the process, proceedings, decrees, and sentences of the ecclesiastical court of this realm wherein such suit or matter for the premises shall depend or be; and that every of the king's said counsellors, or two justices of the peace, whereof the one to be of the quorum, as is aforesaid, shall have power to take and record such recognizances and obligations. § 1.

Provided, that this shall not extend to any inhabitant of the city of *London*, concerning any tithe, offering, or other ecclesiastical duty, grown and due to be paid within the said city; because there is another order made for the payment of tithes and other duties within the said city. § 2.

Provided also, that all persons being parties to any such suit, may have their lawful action, demand, or prosecution, appeals, prohibitions, and all other their lawful defences and remedies in every such suit, according to the said ecclesiastical laws, and laws and statutes of this realm, in as ample manner as they might have had if this act had not been made. § 3.

Shall have power to attach] In the case of *King* v. *Sanchel*, *H.* 9 *W.*, when several quakers had been committed upon this statute, it was alleged, that the jurisdiction of the spiritual court was taken away by the act of parliament which gives the parson a remedy to recover such tithes by distress, by warrant of a justice of the peace: But by the court, The said act seems only to be an accumulative remedy, and not to repeal the former act of the 27 *H.* 8. *L. Raym.* 323. (*c*)

[532] By the 32 *H.* 8. *c.* 7. (which was also made upon occasion of the dissolution of monasteries, and which was chiefly intended to enable laymen, that by the dissolution had estates or interests in parsonages, or vicarages impropriate, or otherwise in tithes, to sue for subtraction of tithes in the ecclesiastical court,) it is enacted as followeth: Where divers persons inhabiting in sundry counties and places of this realm, not regarding their duties to Almighty God and to the king our sovereign lord, but in few years past more contemptuously and commonly presuming to offend and infringe the good and wholesome laws of this realm and gracious commandments of our sovereign lord, than in times

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(*c*) See also *Rex* v. *Owen*, 4 *Burr.* 2095. [In which case the method of proceeding for subtraction of tithes is discussed both at bar and bench. A commitment under 27 *Hen.* 8. *c.* 20. for a contempt in a suit in a spiritual court for ecclesiastical dues, must specify the kind of dues for which the party was sued. *The King* v. *Sanchel*, 1 *Ld. Raym.* 323.]

past hath been seen or known, have not letted to subtract and withdraw *the lawful and accustomed tithes of corn, hay, pasturages, and other sort of tithes and oblations, commonly due to the owners, proprietaries, and possessors of the parsonages, vicarages, and other ecclesiastical places within this realm:* being the more encouraged thereto, for that divers of the king's subjects, being lay persons, having parsonages, vicarages, and tithes to them, and their heirs, or to the heirs of their bodies, or for term of life or years, cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful withholding and detaining of the said tithes or other duties, nor can by the order of the common laws of this realm have any due remedy against any person, his heirs, or assigns, that wrongfully detaineth or withholdeth the same: by occasion whereof much controversy, suit, and variance is like to ensue among the king's subjects, to the great damage and decay of many of them, if convenient and speedy remedy be not provided: It is therefore enacted, that *all persons of this realm, of what* estate, degree, or *condition soever* (4) they be, shall fully, truly, and effectually divide, set out, yield, or pay, *all and singular tithes and offerings aforesaid*, according to the lawful customs and usages of parishes and places whence such tithes or duties shall arise or become due; and if any person, of his ungodly and perverse will, shall detain and withhold any of the said tithes or offerings, or any part thereof, then the person or persons, being *ecclesiastical or lay* (4), having cause to demand the said tithes or offerings, being thereby wronged or grieved, shall and may convent the person so offending before the ordinary, his commissary, or other competent minister or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit, the same ordinary or other judge, having the parties or their lawful procurators before him, shall proceed to the examination, hearing, and determination of every such cause or matter, ordinarily or summarily, according to the course and process of the said ecclesiastical laws, and thereupon give sen- [533]
tence accordingly. § 1, 2.

And if any of the parties shall appeal from the sentence, order, and definitive judgment of the said ordinary or other competent judge as aforesaid; then the same judge shall, upon such appellation made, adjudge to the other party the reasonable costs of his suit thereinbefore expended; and shall compel the same

(4) For at common law, and before this statute laymen could not have been possessed of or sued for tithes. *Ridley* v. *Story*, *Dan. R.* 10. Thus the *tithes* of a rectory cannot descend by the custom of gavelkind, though the *lands* thereof may. *Doe d. Lushington* v. *Bp. of Llandaff and others*, 1 *New. R.* 491—508.

party appellant to satisfy and pay the same costs so adjudged, by compulsory process and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if afterwards the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded; and so every ordinary or other competent judge ecclesiastical shall adjudge costs to the other party, upon every appeal to be made in any suit or cause of subtraction or detention of any tithes or offerings, or in any other suit to be made concerning the duty of such tithes or offerings. § 3.

And if any person, after such sentence definitive given against him, shall obstinately and wilfully refuse to pay his tithes or duties, or such sums of money so adjudged, wherein he shall be condemned for the same; it shall be lawful for two justices of the peace for the same shire, whereof one to be of the quorum, upon information, certificate, or complaint to them made in writing by the said ecclesiastical judge that gave the same sentence, to cause the same party so refusing to be attached and committed to the next gaol, and there to remain without bail or mainprize, till he shall have found sufficient sureties, to be bound by recognizance or otherwise, before the same justices, to the use of our lord the king, to perform the said definitive sentence and judgment. § 4.

Provided, that no person shall be sued or otherwise compelled to pay any tithes, for any manors, lands, tenements, or other hereditaments, which by the laws or statutes of this realm are discharged or not chargeable with the payment of any such tithes. § 5.

Provided also, that this shall not in any wise bind the inhabitants of the city of London and suburbs of the same, to pay their tithes and offerings within the same city and suburbs, otherwise than they ought to have done before. § 6.

And in all cases where any person shall have any estate of inheritance, freehold, term, right, or interest, in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical
[531] or spiritual profit, which shall be made temporal or admitted to be in temporal hands and lay uses and profits by the laws or statutes of this realm, shall be disseised, deforced, wronged, or otherwise kept or put from their lawful inheritance, estate, seisin, possession, occupation, term, right, or interest therein, by any other person claiming to have interest in or title to the same; the person so disseised, deforced, or wrongfully kept or put out, his heirs, his wife, and such other to whom such injury and wrong shall be done, may have their remedy in the king's temporal courts, or other temporal courts, as the case shall require, for the recovery or obtaining of the same, by writs original of *præcipe quod reddat*, assize of *novel disseisin*, *mort d'ancestor*, *quod ei*

deforceat, writs of dower, or other writs original, as the case shall require, to be devised and granted in the king's court of chancery, in like manner and form as they might have had for lands, tenements, or other hereditaments in such manner to be demanded: and writs of covenant and other writs for fines to be levied, and all other assurances to be had of the same, shall be granted in the said chancery, according as hath been used for fines to be levied and assurance to be had of lands, tenements, or other hereditaments. Provided, that this shall not give any remedy, cause of action, or suit, in the courts temporal, against any person who shall refuse to set out his tithes, or shall withhold or refuse to pay his tithes or offerings; but that in all such cases the party, being ecclesiastical or lay, having cause to demand or have the said tithes or offerings, and thereby wronged or grieved, shall have his remedy for the same in the spiritual courts, according to the ordinance in the first part of this act mentioned, and not otherwise. § 7, 8.

Recovery of treble value in the temporal courts by the 2 & 3 *Ed.* 6.

6. By the 2 & 3 *Ed.* 6. *c.* 13. the aforesaid acts of the 27 *H.* 8. *c.* 20. and the 32 *H.* 8. *c.* 7. shall stand in full force: And moreover, it is further enacted as followeth; viz. *All persons shall truly and justly, without fraud or guile*, divide, set out, yield, and pay all manner of the *prædial tithes*, in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid *within forty years next before the making of this act, or of right or custom ought to have been paid*; and no person shall take or carry away any such or like tithes, which have been yielded or paid within the said forty years, or of right ought to have been paid in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, *or otherwise agreed for the same tithes with the parson, vicar, or other owner, proprietary, or farmer of the same tithes; under the pain of forfeiture of treble value of the tithes so taken or carried away.* § 1.

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Truly and justly without fraud or guile] In the case of *Heale* and *Sprat*, *T.* 44 *Eliz.* In a prohibition; the case was, Heale did set out his prædial tithes, and divided them justly from the nine parts, and soon after carried the same away. Sprat sued for a subtraction of the same in the ecclesiastical court. Heale pleaded that he had set them out, as above. Whereunto Sprat said, that presently after his setting out, he carried the same away, to the defrauding of the statute. And it was adjudged, that this was fraud and guile within this act, albeit he did justly divide the same within the letter of this law. It was further resolved, that if the owner of the corn before severance grant the same to another, of intent that the grantee should take away the same, to the end to defraud the parson of his tithe: this is fraud and guile within the statute. 2 *Inst.* 649.

Prædial tithes] This branch extends only to prædial tithes [such as can be set out, both *great and small*. (5)] Thus in the case of *Booth* and *Southraie*, *E.* 1 *Ja.* In debt upon this statute by the parson of the church, for not setting forth the tithes of cheese, calves, lambs, cherries, and pears, to have the treble value; the defendant pleaded *nihil debet*, and it was found against him. And it was moved in arrest of judgment, that the said tithes of cheese, or calves, and lambs, were not prædial tithes, and therefore not within this branch of the statute; and this act is penal, and shall not be taken by equity. Which was allowed by the whole court. 2 *Inst.* 649. (*Cro. Eliz.* 475.)

Within forty years next before the making of this act] This time of forty years is set down, because forty years in the ecclesiastical court is the usual time for proof of a *modus*. 2 *Inst.* 649. 1 *Ought.* 263. [1 *P. Wms.* 663.]

Or of right or custom ought to have been paid] The sense of these words, *of right ought to have been paid*, is of tithes to be yielded in specie within forty years, and the sense of the words; *of right or custom*, is, by rightful custom *de modo decimandi*. 2 *Inst.* 650. (*d*)

(5) *Per Macdonald* C. B. in *Scarr* v. *Trin. Coll.* 3 *Anstr. R.* 760. 9 *Vin. Abr.* tit. *Dismes* (G 6.) *Beadle* v. *Shearman*, *Cro. El.* 608. 2 *Inst.* 650. 2 *Ld. Raym.* 1172.

(*d*) A declaration on this statute must state that the tithes were paid, or *ought to have been paid*, forty years before the making of the statute; otherwise the plaintiff must give evidence of actual payment. *Ld. Mansfield* v. *Clarke*, 5 *T. Rep.* 264. [*n. a. Spieres* v. *Parker*, 1 *T. R.* 145. And it is bad in arrest of judgment, even after verdict. *Butt* v. *Howard*, 4 *B. & A. R.* 655.] But where the declaration stated that they were *of right yielded and payable, and yielded and paid*, the court of king's bench held that the action lay, although there was no evidence of actual payment, but, on the contrary, the land, as far back as was remembered, had been in grass till 1791, when it was ploughed, and had never paid any prædial tithe; for there was no evidence here to presume a grant of the tithes. *Mitchell* v. *Walker*, 5 *T. Rep.* 260. And in a subsequent case, where it was alleged that *the tithes were granted, yielded, and paid, and were of right due and payable*, the court of common pleas held, that the plaintiff need not prove that the article was cultivated on the land before the making of the stat. *Ed.* 6.; but it lies on the defendant to prove it was not. *Halliwell* v. *Trappes*, 2 *Bos. & Pul. N. Rep.* 173. [In an action for not setting out tithes, the plaintiff must state his title, at least accurately enough to bring it within the words of the statute under which he sues; a declaration by lessee of tithes therefore, as "*owner and proprietor*" of them, is bad. *Stevens* v. *Aldridge*, 5 *Pri. R.* 334. In answer to a suit for subtraction of tithe, it is not sufficient to state generally that instead of a tithable gain, a loss accrued, without specifically setting forth the deductions claimed. *Leith* v. *Cliff*, 2 *Phill. R.* 389. Whether a suit for subtraction of tithes is barred by certificate of

Or otherwise agreed for the same with the parson, vicar, or other owner, proprietary, or farmer of the said tithes] E. 6 G. 3. *Chave* and *Calmel*. A prohibition was moved for to the consistorial court of the bishop of Exeter, to stay proceeding in a cause instituted there for subduction of tithes. The case was, that Mr. Calmel the impropriator had employed one Finnimore as his agent, to collect and compound for tithes. Chave the occupier had agreed with Finnimore, after the corn was cut and ready to be housed, for *5l.* Whereupon he housed his whole crop, without setting out the tithes. Chave's agreement with Finnimore was only by parol. The impropriator libelled in the ecclesiastical court against Chave, for not setting out his tithes. Chave tendered the *5l.*, and offered a plea that he had purchased the tithes for *5l.* The ecclesiastical court rejected this plea. The question was, whether this was matter of appeal, or of prohibition? And the court were unanimous, that it was matter of prohibition. They founded their opinion upon this rejection of the plea being a grievance irreparable; and upon an apprehension that the ecclesiastical court must have grounded their rejection upon a supposed difference between their law and the common law; that is to say, they took it for granted that the ecclesiastical court were of opinion, agreeable to what is laid down by bishop Gibson (who takes it from a note in Noy,) that an agreement with the agent of a proprietor of tithes will not bind the proprietor: whereas by the common law, and in common sense and common justice, a composition by the occupier with the agent of the proprietor doth bind and ought to bind his principal. Indeed, where the ecclesiastical court have jurisdiction, and proceed therein according to their law, where it doth not differ from the common law, the rejection of a plea would be matter of appeal. But where the ecclesiastical law differs from the common law, and the ecclesiastical court would require greater proof from the defendant than the common law requires; or would esteem an agreement not to bind the impropriator, which at common law would bind him; there an appeal could be of no service to the defendant in the ecclesiastical court: because the superior ecclesiastical court would [537] equally adhere to their own law, as the inferior ecclesiastical court had done; and would determine alike, as being guided by the same principle of determination. Therefore, as the judges of this court supposed that in the present case the judge of the consistory court rejected the plea because he thought the agreement with the agent not binding upon Mr. Calmel the principal, which at common law did bind him, they held this to be matter of prohibition and not of appeal. And though it had been observed,

bankruptcy seems undecided. *Breithwaite* v. *Hollingshead*, 1 *Hagg. R.* 470.]

that tithes lie in grant; yet they had no doubt that the occupier might, with sufficient propriety, be said to have purchased these tithes, notwithstanding the contract was only by parol. For whatever might have been objected to its not being by deed, if this corn had been standing, or if it had been a sale by the proprietor of the tithes to a third person, yet the present case is by no means liable to such an objection: for the corn was here severed from the ground, and ready to be housed; and it was not a sale of the tithes by the proprietor to a stranger, but a composition between the proprietor and occupier, for that turn only. 3 *Burr. R.* 1873.

Under the pain of forfeiture of treble value of the tithes so taken and carried away] This branch doth not give the forfeiture to any person in certain; and therefore it was pretended, that the forfeiture should be given to the king: and thereupon, the attorney-general, *H.* 29 *El.* did exhibit an information in the exchequer, against one Wood a parishioner of Iclington in the county of Cambridge, for this treble forfeiture, for carrying away his tithes before they were justly divided. The defendant pleaded not guilty; and by a jury at the bar he was found guilty: and in arrest of judgment it was moved, that in this case the forfeiture was not given to the king, for that the words of the act be, *under the pain of forfeiture of treble value of the tithes so taken away:* and whensoever a forfeiture is given against him that doth dispossess the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or dispossessed; and the rather, for that this is an additional law, and made for the benefit of the proprietor of the tithes. And so it was adjudged by Manwood and the whole court of exchequer. And this was the first leading case that was adjudged upon this point: and ever since, it hath been received for law, that the party in-
[538] terested in the tithes shall in action of debt recover the treble value. 1 *Inst.* 159. 2 *Inst.* 650.

[*H.* 47 *Geo.* 3. *Phillips* v. *Davies.* This was an action on the stat. 2 & 3 *Ed.* 6. *c.* 13. by the impropriator, to recover the treble value of the tithes of corn omitted to be set out by the defendant. At the trial the defence set up was a custom to set out the eleventh mow of corn, instead of the tenth. The learned judge nonsuited the plaintiff, on the ground, that an action to recover a penalty was not a proper form of action to try a substantial question of right. A motion was made to set aside the nonsuit; and the court of K. B. held that the validity of this custom was fit to be tried in this form of action, though penal in its nature: being given to the party grieved, and his only remedy at common law for the subtraction of the tithe due to him. 8 *Term Rep.* 178.]

And it is to be observed, that the treble value only, and not the tithes themselves, nor any satisfaction for them, may be re-

covered in the temporal court; that being out of the jurisdiction of those courts, and wholly in the spiritual court. Which is the reason why in all suits upon this statute, the action is not laid for subtraction of tithes, but for a contempt of the statute, in not setting them out. And being a contempt, the action dies with him who committed the contempt, and doth not lie against his executor. *Gibs.* 697. 1 *Vern.* 60.

And it hath been held, that an action grounded on this statute, for not setting forth of tithes, is not within the statute of limitations, that statute not extending to actions grounded on acts of parliament; therefore the plaintiff is not by law confined to six years, or to any other time certain, within which to bring his action. *Wats. c.* 58.

Thus, in the case of *Marston* and *Clepole*, *E.* 1726; on a bill by a lay impropriator for tithes in the court of exchequer, for about twenty-four years; the defendant, as to such part of the bill as prayed discovery and relief for any time before within six years next before filing the bill, or serving the subpœna, pleaded the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years; but it was over-ruled by the court, because the defendant, as to tithes, is only in the nature of a receiver or bailiff for the plaintiff; in which case the statute of limitations doth not operate. *Bunb.* 213.

If a jury give a verdict for the plaintiff, they must find the real value of the tithes, which shall be trebled by the court; as if the jury find the real and single value to be twenty pounds, they ought to give the plaintiff only so much, and the court shall treble it, and make that sum given by the jury to be sixty pounds, which is the treble value. But if the issue be upon the custom of tithing, or any other collateral point, the jury then need not to find any value of the tithes; for that in such case the defendant shall pay the value expressed by the plaintiff in his declaration: because, by the collateral matter pleaded in bar, the value of the tithes set forth in the declaration is confessed. Therefore in all actions brought upon this statute, if the defendant plead any collateral matter in bar of the action, he must take the value of the tithes mentioned in the declaration by protestation; that is, he [539]
must by the form of a protestation aver, that the tithes were not of that value as is declared; otherwise he will be charged with the value the plaintiff hath by his declaration set upon them. And the same law is said to be, if judgment be given for the plaintiff by *nihil dicit*, *non sum informatus*, or upon demurrer. *Wats. c.* 58.

And neither damages nor costs can be recovered with the treble value; because the statute hath not expressly given them: except that by the statute of the 8 & 9 *W. c.* 11. it is enacted, that in all actions of debt upon the statute for not setting forth of

tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs. § 3.

Recovery of double value in the ecclesiastical court by the same statute.

7. By the aforesaid statute of the 2 & 3 *Ed* 6. *c.* 13. At all times whensoever, and as often as any prædial tithes shall be due at the tithing of the same, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts; and the same quietly to take and carry away: and if any person carry away his corn or hay, or his other prædial tithes, before the tithe thereof be set forth; or willingly withdraw his tithes of the same, or of such other things whereof prædial tithes ought to be paid; or do stop or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view, take, and carry away their tithes as is abovesaid; by reason whereof the said tithe or tenth is lost, impaired, or hurt: then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting, or stopping, *shall pay the double value* of the tenth of tithe so taken, lost, withdrawn, or carried away, *over and besides the costs, charges, and expences of the suit in the same:* The same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. § 2.

Provided, that no person shall be sued or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real. § 4.

[540] *Shall pay the double value*] The reason why the double value is by this branch to be recovered in the ecclesiastical court, where by the former branch the parson at the common law shall recover the treble, is, for that in the ecclesiastical court he shall recover the tithes themselves; and therefore the value recovered in the ecclesiastical court is equivalent with the treble forfeiture at the common law. 2 *Inst.* 650.

And the double value, together with the statute, ought to be expressly mentioned in the libel: but yet the libel must be so ordered, as not to be grounded directly upon the statute for more than double value; for if the single damages, that is, the value of the tithes, be also grounded upon it, this will be interpreted a suing in the spiritual court for treble value; and a prohibition will lie. *Godb.* 245. *Gibs.* 697.

Over and besides the costs, charges, and expences] So as the suit in the ecclesiastical court is more advantageous, than the suit for the treble forfeiture at the common law. For at the common law he shall recover no costs; but he shall recover in the ecclesiastical court his costs, charges, and expences. 2 *Inst.* 651.

8. And if any person do subtract or withdraw *any manner of tithes, obventions, profits, commodities, or other duties* (*before mentioned*), or any part of them, contrary to the true meaning of this act, or of any other act heretofore made; the party so subtracting or withdrawing the same *may be convented* and sued in the king's ecclesiastical court, by the party from whom the same shall be subtracted or withdrawn, to the intent the king's ecclesiastical judge may hear and determine the same, according to the king's ecclesiastical laws: And it shall not be lawful to the parson, vicar, proprietor, owner, or other their farmers or deputies, contrary to this act, to convent or sue such withholder of tithes, obventions, and other duties aforesaid, before any other judge than ecclesiastical. 2 & 3 *Ed.* 6. *c.* 13. §13.

Manner of suing for ***tithes, oblations,*** **&c. in the ecclesiastical court.**

And if any archbishop, bishop, chancellor, or other judge ecclesiastical, give any sentence in the aforesaid causes of tithes, obventions, profits, emoluments, and other duties aforesaid, or in any of them (and no appeal or prohibition hanging), and the party condemned do not obey the said sentence; it shall be lawful to every such judge ecclesiastical, to excommunicate the said party so as aforesaid condemned and disobeying: in which sentence of excommunication, if the said party excommunicate wilfully stand and endure still excommunicate by the space of forty days next after, upon denunciation and publication thereof in the parish church, *or the place or parish* where the party so excommunicate is dwelling or most abiding; the said judge [541] ecclesiastical may then at his pleasure signify to the king in his court of chancery, of the state and condition of the said party so excommunicate, and thereupon require process *de excommunicato capiendo* to be awarded against every such person as hath been so excommunicate. *Id.*

And if the party in such case shall sue for a prohibition, he shall, before any prohibition granted, deliver to some of the justices or judge of the court where he demandeth prohibition, a true copy of the libel, subscribed by his hand; and under the copy of the said libel shall be written the suggestion wherefore he demandeth the prohibition: And in case the said suggestion, *by two honest and sufficient witnesses at least*, be not *proved true* in the court where the said prohibition shall be so granted, *within six months next following* (6), after the said prohibition shall be

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(6) These are *calendar* and not *lunar* months, and the act extends to prohibitions in suits for small tithes as well as great. *Foy* v. *Lister*,

so granted and awarded; then the party that is letted or hindered of his suit in the ecclesiastical court by such prohibition shall, upon his request and suit, without delay, *have a consultation granted* by the same court; and shall also recover double costs and damages against the party that so pursued the prohibition, to be assigned or assessed by the same court; for which costs and damages the party may have an action of debt. § 14.

Provided, that nothing herein shall extend to give any minister or judge ecclesiastical, any jurisdiction to hold plea of any matter, cause, or thing, *contrary to the statute of Westminster* 2. *c.* 5., *the statutes of articuli cleri, circumspecte agatis, sylva cædua, the treatise de regia prohibitione, nor against the statute of* 1 *Ed.* 3. [*c.* 10. misprinted for *st.* 2. *c.* 11.]; nor to hold plea in any matter whereof the king's court of right ought to have jurisdiction. § 15.

§ 13. *May be convented*] In the case of *Machin* and *Molton*, *E.* 11 *W.* It was moved for the discharge of a rule by which a prohibition was granted, unless cause shewed to the consistory court of the archbishop of York, where Molton, rector of the church of South Collingham in the diocese of York, preferred a libel against Machin for subtraction of tithes. And the motion for the prohibition was grounded upon a suggestion, that Machin lived within the diocese of Lincoln, and therefore ought not to be cited out of the diocese where he lived, by the 23 *H.* 8. *c.* 9. And the cause which was shewed to the court to discharge the rule was, because Machin had lands within the diocese of York, namely, in the parish of South Collingham; for the tithes of corn growing upon which lands Molton libelled in the consistory court of York; and when the citation was served, Machin
[542] was there, though he lived generally within the diocese of Lincoln. And by *Holt* chief justice: If a man lives within the diocese of A. and occupies lands in the diocese of B., if he subtracts tithes in B., he may be cited and sued there; and it is not

2 *Ld. Raym.* 1172. Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to single costs under stat. 8 & 9 *W.* 3. *c.* 11. § 3., and not to double costs under stat. 2 & 3 *Ed.* 6. *c.* 13. § 14.; which latter only applies to cases where the party who is hindered of his suit in the ecclesiastical court by the prohibition acquiesces in it: and then the party obtaining it must within six calendar months verify his suggestion by the depositions of two witnesses in the court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages. *Trask* v. *French*, 15 *E. R.* 574. It is doubtful whether the writ of consultation can now be granted on the latter statute: and if the six months are understood to relate to the trial only, it must be understood with some latitude; as in the case of suits in the *northern* counties, or of prohibitions issuing in Trinity Term. *Salter* v. *Greenway*, *T.* 22 *G.* 3. K. B., cited *Tidd*, 7th ed. 960.

within the said statute: for when he occupies lands in B. that makes him an inhabitant there, and out of the intent of the statute; and by the statute of the 32 *H.* 8. *c.* 7. § 2. the suit for withholding of tithes in express words is appointed to be, before the ordinary of the place where the wrong was done. *L. Raym.* 452. 534.

Or the place or parish] It seemeth that the words should be, *of* the place or parish.

§ 14. *By two honest and sufficient witnesses at least*] This clause was made in favour of the clergy, for proof to be made by witnesses; which they had not at the common law. But if the suggestion be in the negative, as if the proprietary of a parsonage impropriate sue for tithes, and the cause of the suggestion be, that the parsonage is not impropriate; or if a parson sue for tithes of lands in his parish, and the party sue for a prohibition, for that the land lieth not in that parish, or that the parson that sueth for tithes was not inducted, or any the like cause in the negative of any matter of fact; he shall not produce any witnesses by force of his branch, because a negative cannot be proved: and therefore a prohibition upon causes in the negative remains as it was at the common law. 2 *Inst.* 662.

Proved true] It is sufficient in this case that enough is proved, upon which to ground a prohibition, though the suggestion be not shewn to be strictly and wholly true. So where the suggestion was for twenty acres of pasture, and as many acres of wood in lieu of tithes, and proof was only made of the wood; or where the suggestion was for wool and lamb, and the witnesses only proved as to the lamb; or for a hundred acres, when there were only sixty; or for twenty shillings by way of modus, where the sum was forty shillings: in these cases, the proofs were adjudged to be sufficient, because enough was proved to shew that the court christian ought not to hold plea thereof. But if proof is neither made of the modus laid, nor of any other modus; then the suggestion is not proved. *Gibs.* 699.

As to the clearness of the evidence, it is sufficient in this case, if the witnesses do declare as to the matter of the suggestion, that they believe it, or have known it so, or have heard it, or that [543]
there is a common fame of it. *Gibs.* 699.

Within six months] If there is no certainty in the first proof, it cannot be supplied by good proof after the six months; but if good proof is made within the time, it may be certified after the time. *Gibs.* 700.

Six months] That is, six calendar months; and not to be reckoned by twenty-eight days to the month. 2 *Salk.* 554. (7)

(7) *Foy* v. *Lister*, 2 *Ld. Raym.* 1192. See *Noy*, 30. *Hob.* 179. *Litt. R.* 19.

Six months next following] Which must be computed from the *teste* of the writ; and not six months in the term time only, but the vacation shall be included as part of the time. 2 *Salk.* 554. *L. Raym.* 1172. (8)

Have a consultation granted] After which the party may have a new prohibition upon the same libel: inasmuch as the statute of the 50 *Ed.* 3. against prohibition after consultation, extends not to those consultations for defect of proof within six months, but only to consultations which are granted upon the matter of the suggestion. *Gibs.* 700.

§ 15. *Contrary to the statute of Westminster the second*] Whereby the writ of *Indicavit*, and the writ of right of the fourth part of tithes, and all dependencies thereupon, are saved. 2 *Inst.* 663.

The statutes of Articuli cleri, Circumspecte agatis, Sylva cœdua] All which, with respect unto tithes, are specified in this title.

The treatise de regia prohibitione] Which is that which is intitled *Prohibitio formata super articulos.* Vet. Magn. Chart. part 2. fol. 7. 2 Inst. 663.

Nor against the statute of the 1 Ed. 3. c. 10.] This is misprinted; for the act is 1 *Ed.* 3. *st.* 2. *c.* 11., that if any suit be in the spiritual court against indictors, a prohibition doth lie. 2 *Inst.* 663.

Contempt of the process, or definitive sentence of the ecclesiastical courts in suits for tithes, may be punished by application to any of the king's honourable council, or two justices of the peace for the shire (*Vid.* 27 *H.* 8. *c.* 20. and 32 *H.* 8. *c.* 7. *supra*), as well as by ecclesiastical censures.

E. 44 *Geo.* 3. *Sandby* v. *Miller.* The plaintiff in this case brought an action at the sittings at Westminster, as vicar of St. Giles, Camberwell, to recover the value of tithes due to him from certain tenements within the vicarage, in the occupation of the defendant, and obtained, upon a count in assumpsit for a *quantum valebant*, a verdict of 7*s.* 6*d.*, which, together with 2*l.* 14*s.* 3*d.* paid into court, constituted the original amount of his demand. A motion was made for leave to enter a suggestion on the roll to exclude the plaintiff from his costs, under stat. 39 & 40 *Geo.* 3. *c.* 104., on the ground of the defendant being resident and liable to be summoned, within the jurisdiction of the court of requests for the city of London, and that the original debt sued for did not exceed 5*l.* The plaintiff resisted the motion, upon the ground, that this being a demand in respect to tithes, came within the *exception* contained in the 11th sect. of the act, *viz.* "*a thing concerning, and property belonging to, the ecclesiastical court,*" and therefore was not within the jurisdiction of the court of requests. The court were of opinion that the *subject of the action*, being the recovery upon a promise of an

(8) See last note.

equivalent for tithes retained, it should have been brought in the court of requests; and that the defendant was entitled to make his rule absolute. 5 *East's Rep.* 194.

Suits for *small tithes* before justices of the peace. (*e*)

9. By the 7 & 8 *W. c.* 6. [continued 10 & 11 *W.* 3. *c.* 15.; made perpetual 3 & 4 *A. c.* 18.] For the more easy and effectual recovery of *small tithes*, and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of *forty shillings* [see *infra*] from any one person; it is enacted, that all persons shall well and truly set out and pay all and singular the tithes commonly called small tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions to the several rectors, vicars, and other persons to whom they shall be due in their several parishes, according to the rights, customs, and prescriptions commonly used within the said parishes respectively: And if any person shall subtract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions, by the space of twenty days at most after demand thereof; it shall be lawful for the person to whom the same shall be due, to make his complaint in writing to two or more justices of the peace within that county, place, or division where the same shall grow due, neither of which justices is to be patron of the church or chapel whence the said tithes shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid. § 1.

[544]

[By 53 *Geo.* 3. *c.* 127. § 4., after reciting the above power of two or more justices under 7 & 8 *W.* 3. *c.* 6. in regard to tithes not exceeding 40*s.* yearly value; and that it has become expedient to enlarge the above amount, and also to extend the said act to all tithes whatsoever of certain limited amount, it is enacted, That such justices of the peace shall from and after the passing of this act, (*viz.* 12 July, 1813) be authorized and required to hear and determine all complaints touching tithes, oblations, and compositions subtracted or withheld, where the same shall not exceed 10*l.* in amount from any one person in all such cases and by all such means, and subject to all such provisions or remedies by appeal or otherwise, as contained in the said act of K. *W.* touching small tithes, oblations, and compositions, not exceeding 40*s.* Provided always nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth: the same provision is re-enacted for Ireland, subject to the remedies by appeal or otherwise by 1 *G.* 2. *c.* 12. and 13 & 14 *G.* 3. *c.* 41. *Ir.*, by 54 *G.* 3. *c.* 68. § 4.]

(*e*) For the forms of process upon this and the two following acts, see 4 *Burn's J. P.* title Tithes.

And on such complaint, the said justices shall summon in writing under their hands and seals, by reasonable warning, every such person against whom such complaint shall be made; and after his appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies produced before them, shall in writing under their hands and seals adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so subtracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just. [7 & 8 *W.* 3. *c.* 6. § 2.]

And if any person shall refuse or neglect, for the space of ten days after notice given, to pay or satisfy any such sum of money as upon such complaint and proceeding, shall by two such justices be adjudged as aforesaid; in every such case the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid; and after detaining them [not less than four days, nor more than eight, 27 *G.* 2. *c.* 20.] in case the said sum so adjudged, together with the reasonable charges of making and detaining the said distress, be not tendered or paid by the said party in the meantime, shall make public sale thereof, and pay to the party complaining so much of the money arising by such sale as may satisfy the said sum so adjudged,
[545] retaining to themselves such reasonable charges for making and keeping the said distress as the said justices shall think fit [and also deducting their reasonable charges of selling the said distress; returning the overplus (if any shall be) to the owner upon demand. 27 *G.* 2. *c.* 20. 7 & 8 *W.* 3. *c.* 6. § 3.]

And the said justices shall have power to administer an oath. 7 & 8 *W.* 3. *c.* 6. § 4.

Provided, that this act shall not extend to any tithes, oblations, payments, or obventions within the city of London, or liberties thereof; nor to any other city or town corporate where the same are settled by act of parliament. § 5.

And no complaint shall be heard and determined by the said justices, unless the complaint shall be made within two years next after the times that the same tithes, oblations, obventions, and compositions did become due. § 6.

Provided also, that any person finding himself aggrieved by any judgment to be given by two such justices, may appeal to the next general quarter sessions to be held for that county or other division; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if they shall find cause to confirm the

said judgment, they shall decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgments had by virtue of this act, shall be removed or superseded by any writ of certiorari, or other writs out of his majesty's courts at Westminster, or any other court, unless the title of such tithes, oblations, or obventions shall be in question. § 7.

Provided, that where any person complained of for subtracting or withholding any small tithes or other duties aforesaid, shall, before the justices to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices subscribed by him; and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter shall be given against him, in case the said prescription, composition, or *modus decimandi* shall not upon the said trial be allowed; in that case, the said justices shall forbear to give any judgment in the matter, and then and in such case the party complaining shall be at liberty to prosecute such person for his said subtraction, in [546] any other court where he might have sued before the making of this act. § 8. (9)

And every person who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions for small tithes, oblations, obventions, or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter session to be held for the said county or other division; and the clerk of the peace shall upon the tender thereof inroll the same, and shall not receive for the inrolment of any one judgment any fee or reward exceeding one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions, or compositions, for which the said judgment was obtained. § 9.

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(9) The sessions may reject evidence of *modus* in lieu of small tithes, where it is first set up on appeal under this section, and was not raised before the two justices who convicted the appellant under §§ 1, 2. of the act: and *semble*, that the power of justices to try questions of tithes under 7 & 8 *W.* 3. *c.* 6. is taken away by § 8., when a question of *modus* is raised. *The King* v. *Jeffreys*, 1 *Barn. & Cres. Rep.* 604.

And if any person against whom such judgment shall be had, shall remove out of the county or other division before the levying of the sum adjudged; the justices who made the judgment, or one of them, shall certify the same under hand and seal to any justice of such other county or place wherein the said person shall be an inhabitant; who shall, by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, levy the sum so adjudged to be levied, upon the goods and chattels of such person, as fully as the said other justices might have done, if he had not removed as aforesaid. § 10.

And the justices who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious; to be levied in manner and form aforesaid. § 12.

And if any person shall be sued for any thing done in the execution of this act, and the plaintiff in such suit shall discontinue his action, or be nonsuit, or a verdict pass against him; such persons shall recover double costs. § 13.

Provided, that any clerk or other person who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act for the same matter for which he hath so sued. § 14.

Suit against quakers [for *great or small tithes* or *church rates*] before justices of the peace.

[547]

10. By the 7 & 8 *W.* 3. *c.* 34. Whereas by reason of a pretended scruple of conscience, quakers do refuse to pay *tithes and church rates*; it is enacted, that where any quaker shall refuse to pay or compound for his *great or small tithes*, or to pay any *church rates*, it shall be lawful for the two next justices of the peace of the same county (other than such justice as is patron of the church or chapel whence the said tithes shall arise, or any ways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden, or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such quaker or quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (or affirmation, in case of the examination of a quaker) the truth and justice of the said complaint, and to ascertain and state what is due and payable; and by order under their hands and seals, to direct and appoint the payment thereof, so as the sum ordered do not exceed *ten pounds* (1): and upon refusal to pay according to

(1) Their power is now extended to any sum not exceeding 50*l.*; and one justice may receive the original complaint and summon the parties to appear before two or more justices, as in 7 & 8 *W.* 3. *c.* 6. § 1. provided. 53 *G.* 3. *c.* 127. § 6. in *England*; 54 *G.* 3. *c.* 68. § 6. in *Ireland*.

such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy the same by distress and sale of the goods of such offender, his executors, or administrators, rendering only the overplus to him or them, the necessary charges of distraining being thereout first deducted and allowed by the said justice. And any person finding himself aggrieved by any judgment given by such two justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they see cause; and if they shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgment had by virtue of this act, shall be removed or superseded by any writ of certiorari or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title of such tithes shall be in question. § 4.

Provided, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted, until after such appeal be determined. § 5.

And by the statute 1 *G. st.* 2. *c.* 6. The like remedy shall be had against any quaker or quakers, for the recovering of *any tithes or rates, or any customary or other rights, dues, or payments,* belonging to any church or chapel, which of right by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place (other than such justice as is patron of any church or chapel, or any ways interested in the said tithes), upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or any [548] churchwarden or chapelwarden, or other person who ought to have, receive, or collect any such tithes, rates, dues, or payments as aforesaid, are authorised and required to summon in writing under their hands and seals, by reasonable warning, such quaker or quakers against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint; and to make such order therein as in the aforesaid act is limited; and also to order such costs and charges as they shall think reasonable, not exceeding ten shillings, as upon the merits of the cause shall appear just; which order shall and may be so executed, and on such appeal may be reversed or affirmed by the general quarter sessions, with such costs and remedy for the same; and

shall not be removed into any other court, unless the titles of such tithes, dues, or payments shall be in question; in like manner as by the aforesaid act is limited and provided. § 2.

And by the 27 *G.* 2. *c.* 20., which directeth in what manner distresses shall be made by justices of the peace, and which gives to the justices power to order the goods distrained to be kept for a certain time before they be sold; and gives power also to the officers making the distress to deduct their reasonable charges; it is provided, that the same shall not extend to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called quakers, contained in the acts of the 7 & 8 *W. c.* 34. and the 1 *G. st.* 2. *c.* 6.

In the case of *The King* against *Roger Wakefield and others*, *H.* 31 *G.* 1. (g) An order of two justices was made against three persons, being quakers, on the 1 *G. st.* 2. *c.* 6., for the payment of certain customary payments, called *chapel salary*, to the Reverend Mr. Smith, curate of the chapel of Burneshead in Westmorland, where the said quakers had estates chargeable with the said payments. On appeal to the sessions, the order was confirmed. The quakers moved for a certiorari, and though cause was shewn against the issuing of it, yet a certiorari was granted: and the return was filed, and exceptions were taken to it, and argued at the bar. Lord *Mansfield* chief justice delivered the opinion of the court: That the certiorari ought not to have issued at all; that the return should be taken off the file, and all
[549] proceedings thereon fall to the ground; and that the orders of the justices and sessions should be remanded. The order of the justices (he observed) was made on the statute of the 1 *G. st.* 2. *c.* 6., which extends the 7 & 8 *W. c.* 34., concerning tithes, to all customary payments due to clergymen. These two acts are to be taken together as one law. They were intended for the benefit of the quakers; to prevent their being liable to expensive suits for refusing to pay tithes upon scruples of conscience, by giving an apparent compulsory method of levying tithes and other customary payments in a summary way. This proceeding cannot be removed by certiorari, unless the title to the customary payments comes in question: And on this proviso the present question arises. The affidavits read on the original motion for the certiorari set forth, that before the justices and the sessions the defendants controverted the right of the curate to these customary payments. The affidavits against the certiorari say, that these payments have been paid from time immemorial; that no inhabitant ever disputed it but these quakers; that they have enjoyed the messuages but a few years, and that the former inhabitants never disputed the right of the parson. Taking these

(g) S. C. 1 *Burr.* 485.

affidavits together, it is clear that the quakers controverted the right to the customary only as all quakers controvert the payment of all dues to clergymen upon scruple of conscience, which is the case directly within the act, and the proceeding must therefore follow the directions of the act. The quakers themselves have acknowledged the jurisdiction of the justices, by appealing to the sessions: whereas had they intended to dispute the title to these customary payments, they would at first have removed the order of two justices by certiorari. The only difficulty remaining arises from the return being already filed. But there are several instances of this court's superseding a certiorari after the return filed: As where an order of justices is removed, and it appears upon the return, that the parties had a right to appeal to the sessions, and that the time for appealing was not expired when the certiorari issued; in such a case this court supersedes the writ of certiorari, *quia improvide emanavit*. The same must be done in the present case.

Tithes severed to be sued for in the temporal courts only.

11. Tithes being set out, or severed from the nine parts, become lay chattels. Upon which foundation, when the tithe of corn was set out in sheaves, and the parson would not take it, but prayed remedy in the spiritual court, a prohibition was granted. And when a sequestration was prayed in the temporal courts, of tithes not set out, the right of which was in controversy, the party was told, his request had been reasonable, if they had been severed from the nine parts. For the same reason, if after severance they are carried away by a stranger, the remedy is in the temporal courts; but otherwise if they are carried away by the owner: because his setting them out, in order to carry them away, is a fraudulent setting out. *Gibs.* 689. (*h*) [550]

And judgment of præmunire hath been given against a man for suing in the spiritual court for tithes, alleging the same to be severed from the nine parts. 3 *Inst.* 121.

Suit for tithes in the courts of equity.

12. Notwithstanding all these statutes, tithes (if of any considerable value) are now generally sued for in the courts of equity by English bill, and for the most part in the exchequer chamber; but not upon the statute for treble or double value: for there can be no suit in equity for the recovery of the double or treble value. *Wood*, *b.* 2. *c.* 12. *Vin. Dismes*, M. b. (*i*)

(*h*) See *Blackwell's* case, *Cro. Eliz.* 607. 843.

[Jurisdiction of chancery and exchequer.]

(*i*) The court of exchequer hath an original and complete jurisdiction over tithes, and will decree an account and payment of the arrears of them. *Lane*, 100. [*Travis* v. *Oxton*, *Gwm.* 1684. 1 *Inst.* 159. a. *n.* 4. 17th ed.] The same relief may be had by a bill filed in the court of chancery. [*Anon.* 2 *Freem.* 27. *Gwm.* 527. *Windham* v. *Norris*, *Gwm.* 136.] And where the title to tithes is clearly made out, although not supported by possession, these courts will decree an account, without an issue. *Lygon* v. *Strutt*, 2 *Anst.* 601. See also

[*T.* 37 *G.* 3. *Chapman* v. *Beard.* This was a suit for tithes in the court of exchequer. The defendant in his answer denied the title of the rector, and insisted that he had not been regularly inducted, and that he had not read the thirty-nine articles. It was held that the plaintiff, having been in possession *fifteen* years, there was *primâ facie* evidence of a regular induction, and of reading the thirty-nine articles; and that the defendant having paid tithes to him, there was also *primâ facie* evidence against him of the rector's title. 4 *Gwill.* 1482.]

Incumbent dying. 13. If the incumbent dieth, his executor may recover the tithes which became due in the testator's lifetime; but he is not [551] entitled to the treble value upon the statute. [*Anon.*] 1 *Vern.* 60.

[*M.* 49 *Geo.* 3. *Williams* v. *Powell.* In this case the vicar of Abergavenny made certain compositions with his parishioners for the vicarial tithes, which were payable on the 29th of September. He died on the 10th of March, 1803, having received his compositions up to the 29th of September, 1802. In May following, the defendant, the present vicar, was presented, and in November following was inducted. After Michaelmas in the same year, the defendant received the vicarial tithes from some of his parishioners according to the composition of his pre-

Foxcroft v. *Parris*, 5 *Ves.* 221. [The former practice in exchequer for directing an issue to try a modus in the first instance, is now altered, but not in every case. *Mitchell* v. *Neale*, 2 *Ves.* 680. See *Chapman* v. *Smith*, 2 *Ves.* 506. *Richard* v. *Evans*, 1 *Ves.* 39.] But in questions between the rector and vicar, the rector having *primâ facie* the title to all the tithes in him, they have no right to make a decree, until the title of the vicar has been established by the decision of a jury, unless such title be made out in the most clear and satisfactory manner. *Garnons* v. *Barnard*, 4 *Gwill.* 1462. Where a modus or composition real is pleaded and supported by reasonable evidence, it is their practice to direct an issue at law before they decree against the common-law right of the parson. Such issue from the court of chancery is tried in the king's bench or common pleas, and from the exchequer on the law side of the same court. But to entitle the tithe owner to the relief of a court of equity, he must make out a substantial case of subtraction, for a trivial incorrectness in setting out the tithe of wool for which amends had been tendered, and the non-payment of Easter dues which were never demanded, were not held sufficient to prevent a bill from being dismissed. 2 *Anst.* 493. *Baker* v. *Athil.* If a bill pray an account of the single value of the tithes, it is a waiver of the penalty of treble value, and an injunction will be granted against suing for it. *Bell* v. *Reed*, *Bunb.* 193. *Woods* v. *Walley*, 1 *Anst.* 100. In a bill for tithes in the exchequer, the court decrees payment of tithes to the time of the filing of the bill; in chancery, to the time of the decree. 2 *P. Wms.* 463. 3 *Atk.* 590. But in *Chamberlaine* v. *Newte*, the house of lords went farther, and ordered that the tithes should be continued to be paid *in future.* 2 *P. Wms.* 463. *in n.*; and 1 *Bro. P. C.* 157.

decessor, and from others, according to new compositions. The plaintiffs, who were the personal representatives of the late vicar, brought an action to recover a proportion of such compositions up to the time of the late vicar's death. The court of K. B. held that the present vicar was not liable to account for more of the compositions which he had received, than the value of the tithes which had become due between the receipt of the last composition by the late incumbent and his death, would amount to. 10 *East's Rep.* 269. (2)

[By 53 *Geo.* 3. *c.* 127. § 5. No action shall be brought for recovery of any penalty for not setting out tithes; nor any suit instituted in any court of equity, or ecclesiastical, to recover the value of any tithes, unless within six years of the tithes becoming due. A like provision was enacted for Ireland by 54 *Geo.* 3. *c.* 68. § 5. (3)] [Limitation of suits for tithes.]

VIII. *Tithes in London.* (4)

In the several acts of the 27 *H.* 8. *c.* 20. § 2. 32 *H.* 8. *c.* 7. 2 & 3 *Ed.* 6. *c.* 13. and 7 & 8 *W. c.* 6. there is a proviso, that nothing therein shall extend to the city of London, concerning

(2) See *ante*, 441. *Aynsley* v. *Wordsworth*, 2 *Ves. & B.* 331.

(3) The putting in charge in the accounts of successive auditors the tithes of an extra parochial place, is a sufficient "standing *insuper*" within 9 *G.* 3. *c.* 16. (*nullum tempus* act); though "*Nil*" had been always returned in such accounts, and the crown had neither granted leases of tithes or received any within 60 years. *Atto. Gen.* v. *Lord Eardley*, 8 *Pri. R.* 74. So where the auditors had made due returns to the officers of the commissioners for auditing the public revenue, it was held that such returns constituted a sufficient "putting in charge" within the act, to save the rights of the crown, though nothing had ever been received within 60 years, nor any suit instituted for recovery of such tithes. *Atto. Gen.* v. *Maxwell*, 8 *Pri. R.* 176.

(4) See on this subject, *Tyrwhitt's* "*Argument on the Non-inrolment in Chancery of the Decree for Tithes in* London, *annexed to* "*Stat.* 37 *H.* 8. *c.* 12.;" published by Messrs. *Butterworth* and Son, 1823: and "Report of the case of *Owen*, clerk, v. *Abbott; or* case "of *St. Olave's*, Hart-Street, before the Lord Mayor, on Feb. 8. 1823, "in which the tithe of 2*s.* 9*d.* in the pound on rack rental was claimed "by the plaintiff under 37 *H.* 8. *c.* 12.; with the opinions of the Recorder and Common Serjeant thereon;" *Sherwood's*, &c. The cause of the Rev. *G. Beresford* v. *The Parishioners of the London Liberty of St. Andrew's, Holborn* (which occasioned the Editor's above-mentioned "Argument"), was afterwards compromised before the hearing; and an act of the 4 *Geo.* 4., which received the royal assent on June 27. 1823, fixed a certain stipend to be paid to the present incumbent and his successors in lieu of all the tithes soever arising within this liberty.

any tithe, offering, or other ecclesiastical duty, grown and due to be paid within the said city; because there is another order made for the payment of tithes and other duties there.

Which order is as followeth: It appeared by the records of the city of London, that Niger bishop of London, in the 13 *Hen.* 3., made a constitution, in confirmation of an ancient custom formerly used time out of mind, that provision should be made for the ministers of London in this manner: that is to say, that he who paid the rent of 20*s.* for his house wherein he dwelt, should offer every Sunday, and every apostle's day whereof the evening was fasted, one halfpenny; and he that paid but 10*s.* rent yearly, should offer but one farthing: all which amounted to the proportion of 2*s.* 6*d.* in the pound, for there were 52 Sundays, and eight apostle's days, the vigils of which were fasted. And if it chanced that one of the apostle's days fell upon a Sunday, then there was but one halfpenny or farthing paid; so that sometimes it fell out to be somewhat less than 2*s.* 6*d.* in the pound.

And it appears by the book cases in the reign of Edward the third, that the provision made for the ministers of London, was by offerings and obventions; albeit the particulars are not assigned there, but must be understood according to the former ordinance made by Niger.

And the payment of 2*s.* 6*d.* in the pound continuing until the 13 *Ric.* 2. Arundel archbishop of Canterbury made an explan-
[552] ation of Niger's constitution, and thrust upon the citizens of London two-and-twenty more saints' days than were intended by the constitution made by Niger; whereby the offerings now amounted unto the sum of 3*s.* 5*d.* in the pound. And there being some reluctation by the citizens of London, pope Innocent, in the 5 *Hen.* 4., granted his bull, whereby Arundel's explanation was confirmed. Which confirmation (notwithstanding the difference between the ministers and citizens of London, about those two-and-twenty saints' days which were added to their number) pope Nicholas also by his bull did confirm in the 31 *H.* 6.

Against which the citizens of London did contend with so high a hand, that they caused a record to be made, whereby it might appear in future ages, that the order of explanation made by the archbishop of Canterbury was done without calling the citizens of London unto it, or any consent given by them. And it was branded by them as an order surreptitiously and abruptly obtained, and therefore more fit to have the name of a destructory than a declaratory order.

Nevertheless, notwithstanding this contention, the payment seemeth to have been most usually made according to the rate of 3*s.* 5*d.* in the pound. For Lindwood, who writ in the time of *Hen.* 6., in his provincial constitutions debating the question,

whether the merchants and artificers of the city of London ought to pay any tithes, sheweth, that the citizens of London, by an ancient ordinance observed in the said city, are bound every Lord's day and every principal feast-day, either of the apostles or others whose vigils are fasted, to pay one farthing for every 10*s.* rent that they paid for their houses wherein they dwelt.

And in the 36 *Hen.* 6. there was a composition made between the citizens of London, and the ministers, that a payment should be made by the citizens according to the rate of 3*s.* 5*d.* in the pound: and if any house were kept in the proper hand of the owner, or were demised without reservation of any rent; then the churchwardens of the parish where the houses were should set down a rate of the houses, and according to that rate payment should be made.

After which composition so made, there was an act of common council made in the 14 *Edw.* 4. in London, for the confirmation of the bull granted by pope Nicholas.

But the citizens of London finding that by the common laws [553] of the realm, no bull of the pope, nor arbitrary composition, nor act of common council, could bind them in such things as concerned their inheritance; they still wrestled with the clergy, and would not condescend to the payment of the said 11*d.* by the year, obtruded upon them by the addition of the two-and-twenty saints' days: whereupon there was a submission to the lord chancellor and divers others of the privy council in the time of king *Hen.* 8.; and they made an order for the payment of tithes according to the rate of 2*s.* 9*d.* in the pound; which order was first promulgated by a proclamation made and afterwards established by an act of parliament made in the 27 *H.* 8. *c.* 21. intituled, "An "act for the payment of tithes within the city and suburbs of "London, until another law and order shall be made and pub"lished for the same." *Privilegia Londini*, 456, 457, 458. (5)

And ten years after this another law and order was made, by the statute of the 37 *H.* 8. *c.* 12. as followeth: Where of late time, contention, strife, and variance hath risen and grown, within the city of London and the liberties of the same, between the parsons, vicars, and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties, within the said city and liberties; for appeasing whereof, a certain order and decree was made thereof, by the most reverend father in God, Thomas archbishop of Canterbury, Thomas Audley, knight, lord Audley of Walden, and then lord chancellor of England, now deceased, and other of the king's most honourable privy council; and also the king's letters

(5) It has been questioned, whether this act is not still in force. See "*Tyrwhitt's Argument*," pages 25—27.

(4) Item, if any person hath taken, or hereafter shall take, any mease or mansion place by lease, and the taker thereof, his executors, or assigns, doth or shall inhabit in any part thereof, and hath within eight years last past before this order, or hereafter
[556] shall let out the residue of the same: in such case, the principal farmer or farmers or first taker or takers thereof, their executors, or assigns, shall pay their tithes after the rate abovesaid, according to the quantity of their rent by the year.

(5) And if any person shall take divers mansion-houses, shops, warehouses, cellars, or stables in one lease, and shall let out one or more of them, and shall keep one or more in his own hands, and inhabit in the same; the said taker and his executors or assigns, shall pay their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion-houses or house retained in his own hands; and his assignees of the residue of the said mansion-house or houses, shall pay their tithes after the rate abovesaid, according to the quantity of their yearly rents.

(6) Item, if such farmer or farmers, or his or their assigns, of any mansion-house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion-house or houses contained in his or their lease, to one or more persons; the inhabitants, lessees, or occupiers thereof, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers and their assigns have been or shall be charged withal, without fraud or covin.

(7) Item, if any dwelling-house within eight years last past was, or hereafter shall be converted into a warehouse, storehouse, or such like; or if a warehouse, storehouse, or such like, within the said eight years was, or hereafter shall be converted into a dwelling-house; the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion-house rents.

(8) Item, that where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse; the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated: and every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents, as is aforesaid, the third penny abated; and the other wharfs belonging to houses having no crane or gibet, shall pay for tithes as shall be paid for mansion-houses in form aforesaid.

(9) Item, that where any mansion-house with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden belonging to the same, or as parcel of the same, is or shall
[557] be occupied together; if the same be hereafter severed or divided,

or at any time within eight years last past were severed or divided, then the farmers or occupiers thereof shall pay such tithes as is abovesaid for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

(10) Item, that the said citizens and inhabitants shall pay their tithes quarterly; that is to say, at the feast of Easter, the nativity of St. John Baptist, the feast of St. Michael the archangel, and the nativity of our Lord, by even portions.

(11) Item, that every householder paying 10*s.* rent or above, shall for him or herself be discharged of their four offering days; but his wife, children, servants, or others of their family, taking the rights of the church at Easter, shall pay 2*d.* for their four offering days yearly.

(12) Provided always, and it is decreed, that if any house which hath been or hereafter shall be letten for 10*s.* rent by the year, or more, be or hath been at any time within eight years last past, or hereafter shall be divided and leased into small parcels or members, yielding less yearly rent than 10*s.* by the year; the owner, if he shall dwell in any part of such house, or else the principal lessee (if the owner do not dwell in some parts of the same) shall pay for the tithes after such rate of rent, as the same house was accustomed to be letten for before such division or dividing into parts and members; and the under farmers and lessees to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than 10*s.* by the year without fraud or covin, paying 2*d.* yearly for four offering days.

(13) Provided always, and it is decreed, that for such gardens as appertain not to any mansion-house, and which any person holdeth in his hands for pleasure, or to his own use; the person holding the same shall pay no tithes for the same. But if any person which shall hold any such garden, containing half an acre or more, shall make any yearly profit thereof, by way of sale; he shall pay tithes for the same after such rate of his rent as is herein first above specified.

(14) Provided also, that if any such gardens now being of the quantity of half an acre or more, be hereafter by fraud or covin divided into less quantities; then to pay according to the rate abovesaid.

(15) Provided always, that this decree shall not extend to the houses of great men, or noblemen, or noblewomen, kept in their own hands, and not letten for any rent, which in times past [558] have paid no tithes, so long as they shall so continue unletten: nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

(16) Provided always, and it is decreed, that this present

order and decree shall not in any wise extend to bind or charge any sheds, stables, cellars, timber yards, nor teinter yards, which were never parcel of any dwelling-house, nor belonging to any dwelling-house, nor have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

(17) Provided also, and it is decreed, that where less sum than after 16½*d.* in the 10*s.* rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent, hath been accustomed to be paid for tithes; in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

(18) Item, it is also decreed, that if any variance, controversy, or strife, shall arise in the said city for non-payment of any tithes; or if any variance or doubt shall arise upon the true knowledge or division of any rent or tithes, within the liberties of the said city, or of any extent or assessment thereof; or if any doubt arise upon any other thing contained within this decree; then *upon complaint made* by the party grieved, *to the mayor of the city of* London *for the time being* (6), the said mayor by the advice of counsel shall call the parties before him, and make a final end of the same, with costs to be awarded by the discretion of the said mayor and his assistants, according to the intent and purport of this present decree.

(19) And if the mayor shall not make an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved: the lord chancellor of England for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

(20) Provided always, that if any person take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes; such person, his executors, or assigns, shall pay tithes only after the rate of the rent reserved in his lease, and none otherwise, as long as the same lease shall endure.

[Rate how assessed.] (1) *Of every* 10*s. rent by the year*] It was resolved, in the case of Dr. *Meadhouse* against Dr. *Taylor*, that a rent for half a year,

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(6) An act of parliament creating a special jurisdiction never ousts the jurisdiction of Westminster Hall without special words. Hence notwithstanding remedy for the recovery of tithes is thus given before the lord mayor of London by this act, yet as it has no negative words in it, and tithes being determinable *ab antiquo*, as it is said in the court of exchequer, that court as well as the court of chancery, has an original jurisdiction over tithes in London. See *Langham v. Baker, Hardr. R.* 116. (1658.) *Com. Dig. tit. Dismes* (M 13.) *Gibs.* 1223. *Warden and Minor Canons of St. Paul's v. Crickett, Gwm.* 1425. *Miller v. Kinaston, Dickins. R.* 773.

and afterwards for another half year, is a yearly rent, or a rent by the year, within the meaning of this decree. *Noy*, 130. (7)

Of all houses] In the case of *Green* v. [*Pipe* or] *Piper*, (1591) *E.* 34 *Eliz.*, it was suggested, in order to hinder the granting of a consultation, that the house belonged to a priory which was discharged of tithes by bull. But the court replied, that by the common law houses paid no tithes; and the right in the present case subsisting immediately upon this statute, which lays them upon every house, no exemption shall be allowed but to such houses as are specially exempted by the statute itself. *Cro. Eliz.* 276. (8)

(2) *By reason of any fine or income paid beforehand, or by any other fraud or covin.* *M.* 5. *Ja.* *Skidmore* and *Eire* plaintiffs, in a prohibition against *Bell*, parson of St. Michael, Queen-hithe, in London; the case was this: The said parson libelled before the chancellor of London for the tithes of an house called the Boar's Head in Bread-street, in the said parish, the ancient farm rent whereof was *5l.* at the time of the said decree and after; and that of late a new lease was made of the said house, rendering the rent of *5l.* a year, and over that a great income or fine, which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a sum in gross, and that so much rent

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(7) The rate is to be assessed on the improved fixed rent, and not according to the old rents as they were before the statute. *Sheffield* v. *Pierce*, *Gwm.* 503. *Ivatt* v. *Warren*, *Gwm.* 1054. *Warden and Minor Canons of St. Paul's* v. *Morris*, 9 *Ves.* 155.; and where fraud is imputed it lies on the complainant to prove it; *per Richards*, C. B. in *Minor Canons of St. Paul's* v. *Crickett*, *Dan. R.* 48. Where new houses are built on the site of old buildings, and continue in the occupation of the owner, the tithe is to be estimated on the value and not on the rent of the old buildings, on the site of which they are erected. *Antrobus* v. *E. I. Co.*, 13 *Ves.* 9. (see p. 560.) Indeed if the new house be erected on the site of a shed or other buildings which before paid no tithe, it is liable under the statute. 1 *Dan. R.* 45. *in notis*, and see cases there cited.

(8) *Moor*, 912. S. C. *Gwm.* 161. So it is no defence to a demand for tithe, that the house stands on the site of old houses which never paid it, *Bramston* v. *Heron*. *Gwm.* 1314.; or that there never was nor is any rent paid by the occupier who is the owner, and therefore that there is no tithe due, *Kynaston* v. *E. I. Company*. *Wils. Exch. R.* 25. 4 *Pri. R.* 84. n.; for all houses are chargeable except those expressly exempted by the statute. *Green* v. *Piper*, *Cro. El.* 276. And therefore the deanery house of St. Paul's was held liable to tithes at 2*s.* 9*d.* in the pound on its full value under 37 *H.* 8. *c.* 12. *Warden and Canons* v. *Dean of St. Paul's* (1817). *Wils. Exch. R.* 1. 4 *Pri. R.* 65. S. C. So the privilege does not extend to the building, when altered to another thing; thus where a shed is converted into a warehouse, the exemption for the shed ceases. *Gwm.* 1315. and see § 8. and 10. of the Decree.

might have been reserved for the said house, as the rent reserved and the sum in gross amounted unto; which reservation and covenant were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And in this case four points were resolved by the court: 1. If so much rent be reserved, as was accustomed to be paid at making of the said decree (whatsoever fine or income be paid), that the parson can aver no covin (9); for the words of the decree be, "Where any "lease is or shall be made of any dwelling-house by fraud or "covin, in reserving less rent than hath been accustomed:" so as if the accustomed rent be reserved, no fraud can be alleged; for the fraud by the decree is, when lesser rent than was then accustomed to be paid is reserved, or if no rent at all be reserved, for then tithe shall be paid according to the rent that then was last before reserved to be paid. (1) So as the decree consisteth upon four points: first, where the accustomed rent was reserved; secondly, where the rent was increased, there the tithes should be paid according to the whole rent; thirdly, where lesser rent was reserved; and fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficial for the clergy of London, in respect of that which they had before. And the defendant in his libel confesseth, that the accustomed rent was reserved; and therefore no cause of suit. 2. It was resolved, that as to such houses as were never letten to farm, but inhabited by the owner, this is *casus omissus*, and shall pay no tithes by force of the decree. (2) 3. It was resolved, that where the decree saith, "Where no rent is reserved by reason "of any fine or income paid beforehand;" albeit no fine or income be paid in that case, yet if no rent be reserved, the parson shall have his tithes according to the decree; for that is put but for an example or cause, why no rent is reserved; and whether any fine or income were paid or no, is not material as to the parson. 4. It was resolved, that the parson could not sue for

(9) But in *Warden and Canons* v. *Dean of St. Paul's*, *E.* 1817. *Wils. Ex. R.* 1. 4. *Pri. R.* 65. it was said that where no new lease has been granted for many years, the London clergy are to be paid for their tithe on the expiration of the old one according to the improved annual value, and when on any fine paid for a new lease the rent is reduced, the annual value is to be estimated by the amount of such fine.

(1) But under 37 *H.* 8. *c.* 12. the payment of a large fine if attended by no diminution of the accustomed rent is not fraudulent or covinous within the statute: and the 2*s.* 9*d.* in the pound will be decreed on the rent only. *Canons of St. Paul's* v. *Crickett*, *M.* 1817. *Wightw.* 30. 5 *Pri.* 14. *Dan. R.* 37. Where *Richards* C. B. states all the decisions on the statute, and see another case between the same parties in 2 *Ves.* jun. 563.

(2) But see *infra*, *Antrobus*, v. *E. I. Co.*, 13 *Ves.* 9.

the said tithes in the ecclesiastical court; for that the act and decree that raised and gave these kind of tithes, did limit and appoint how and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same. See page 564 *n*. And in the end it was awarded, that the prohibition should stand. 2 *Inst.* 660. [*Degge, c.* 25. 356.]

Antrobus v. *The East India Company* (1812). This bill was filed by the plaintiff, under the decree and stat. 37 *Hen.* 8. *c.* 12. for the payment of tithes at the rate of 2*s.* 9*d.* in the pound upon the annual *value* of premises, consisting of extensive warehouses, lately erected by the East India Company, and used by them in the course of their trade. The warehouses were erected upon the site of some small tenements, some of which appeared by the answer to have been formerly occupied at low rents: as to the others the antient rents were not known. The answer did not state any specific customary payment in lieu of tithes; but alleged generally, that some less sums than 2*s.* 9*d.* in the pound had been paid. The defendants insisted, that the payment according to the statute could be only upon such of the old rents as were ascertained; and that nothing was to be paid in respect to those premises, the antient rents of which were not known: And they contended, that an issue ought to be directed; which was opposed by the plaintiff on the ground that no specific customary payment being set up, no foundation was laid for an issue. [The master of the rolls, Sir *William Grant*, stated that the proposition in the answer that less payments than at the rate of 2*s.* 9*d.* in the pound had been accustomed to be paid, says nothing more than that the tithe has not been paid at that rate. That is perfectly immaterial unless you can shut out the claim to the full statutory tithe, by shewing some specific customary payment which may be presumed to have had existence at the time the statute was made. These premises are not in lease; no rent therefore is reserved; all the property is in the occupation of the owners. Upon what is the payment to be? The expression of the statute is, that every owner occupying himself, shall pay after the quantity of such yearly rent as the same were last let for, without fraud or covin. The owner might say his house was never let; and therefore there being no rent at which it was last let, it is not liable to any tithe, and it is difficult upon this clause of the statute to maintain the claim of tithe of new houses occupied by the owners. Yet it seems strange that the rector entitled to tithe for the old house, should lose his right to any tithe merely because a new house has been built in its place, all other circumstances remaining precisely the same. (3)

(3) In *Warden and Canons* v. *Dean of St. Paul's, E.* 1817. *Wils. Exch. R.* 1. 4 *Pri. R.* 65., it was expressly held that new houses on old sites are liable according to their annual value.

The plaintiff contends that in cases in which none of the provisions of the statute apply, the rector's claim rests on the first general enacting clause making *all* houses generally subject to tithe. If the general object was to subject all houses, particular words are to be construed so as to give effect to the general purpose. With reference to that there is no reason for the distinction between houses *let* and *not* let, that has been suggested: great incongruity would arise from that, and the words are large enough to include both. The express exemption of some houses that have never been let, (*viz.* in § 16. of the decree) forcibly implies, that if that exemption was not expressed, all houses, whether let or not, would be liable: but then the difficulty occurs, that the payment is to be according to the rent; therefore where there is no rent, no tithe is due: but on the whole, less violence is done to the statute by construing the word "rent" in different senses as it is used in different clauses than by holding all houses that never were in lease to be out of the statute. But this is a difficulty which I have not to encounter; for in this respect the construction is settled by decisions (4) upon which "*rent*" means either actual rent or estimated rent with reference to the value, according to the statute to which it is applied: and in opposition to that, there is only a *dictum* of lord *Coke*, in 2 *Inst.* 660., when it was not the point in the case, that where houses were not let, that is *casus omissus*, and no tithe is payable. The meaning is not, that where there is a yearly rent, recourse shall be had to the value, but that the value is to be considered where there is a rent. Hence the decree was made for payment at the rate of 2*s.* 9*d.* in the pound upon the *value*, and a reference was directed to the master accordingly. 13 *Ves.* 9. 1 *Dow.* P. C. 464. S. C. *Williamson* v. *Gosling*, 3 *Gwm.* 902. S. P.

Customary payments for houses *in* London. (See page *566.*)

(17) *Where less sum than ——————— has been accustomed to be paid for tithes*] Where there had been a custom to pay tithes according to a pound rate before the statute, such payments are still to be continued, as it was never intended to alter or enlarge, but to establish them. Thus by this section if there had been a payment of less sums by agreement between the parson and parishioners, they were confirmed by the statute, the design of which was to settle such customary payments and agreements which have never been set aside or broken through, but have been ever since complied with. *Bennett* v. *Treppas*, 2 *Bro.* P. C. 437. *Bunb.* 106. *Gilb. Exch. Rep.* 191. *St. Bride's* v. *Wilson*, *Gwm.* 635. *in notis.* So if there has been a customary payment since the statute of a less sum than 2*s* 9*d.* in the pound, it may be good evidence to infer that such payment had such an existence as brings it within the description of a customary payment ac-

(4) See *Ivart* v. *Warren*, *Gwm.* 1054. *Grant* v. *Cannon*, *id.* 541. *Williamson* v. *Gosling*, *id.* 502.

cording to the true intendment of the act. *Antrobus* v. *E. I. Co.* 13 *Ves.* 9. *Gwm.* 640., which customary payment must have been in existence at the time of the act. But when the payment of such less sums is insisted on, it will be necessary for the parties so insisting, to prove what specific sum is, and has been paid, S. C. *infra*, 560. But no *entire exemption* can be claimed in London, see *Green* v. *Piper*, &c. page 559.]

(18) *Upon complaint made*] In the aforesaid case of Dr. *Meadhouse* and Dr. *Taylor*, it was held by the court, that the complaint ought to be in writing (and not by word of mouth only), in the nature of a *monstrans de droit* declaring all the title. *Noy*, 130.

To the mayor] Pursuant to the aforesaid case of *Skidmore* and *Eire*, divers prohibitions have been granted (when tithes were sued for upon this statute) to the ecclesiastical court. But when it was pleaded in the year 1658, that the right of tithes, upon the foundation of this act, could not be cognizable in the exchequer, by reason of the provision therein made for determining of all controversies before the lord mayor or lord chancellor; it was held clearly by the barons, that the court of exchequer had jurisdiction in the cause, because the act had no negative words in it. —— Upon which Dr. *Gibson* shrewdly observes, that if affirmative words will not exclude the temporal court, it may be hard to find a good reason why (according to the foregoing judgments) they should exclude the spiritual court. *Gibs.* 1223. (See 564 (*a*) *note*.)

After all, notwithstanding this settlement by the aforesaid decree, divers prescriptions for the payment of lesser rates than the parsons might require by the said settlement, (as to pay 10*s.* for the tithe of an house, although the rent thereof was 40*l.* a year or more, have been gained and allowed. (*k*) But upon the occasion of the fire in London in the year 1666, as to the churches and houses thereby consumed, another statute was made, namely, the 22 & 23 *C.* 2. *c.* 15., which is as followeth: Whereas the tithes in the city of London were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away of some houses, altering the foundations of many, and the new-erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise; it is therefore enacted, that the annual certain tithes of the parishes within the said city and liberties thereof, whose churches have been demolished, or in part consumed by [561]

(*k*) These are confirmed by § 17. of the decree. [See *Bennett* v. *Treppas*, Gilb. *Eq. Rep.* 191. 8 *Vin. Ab.* 568. *Bunb.* 106. 2 *Bro. P. C.* 439.]

the late fire, and which said parishes by virtue of an act of this present parliament remain and continue single as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth; that is to say, the annual certain tithes, or sum of money in lieu of tithes.

			[Increased by 44 *G.* 3. *c.* lxxxix.] to		
	£	s.	£	s.	d.
(1) *Of the parish of* Alhallows Lombard-street - - -	110	0 —	200	0	0
[*Alhallows* Bread-street, and St. John Evangelist, and Alhallows the great and the less, see (18) and (19).]					
(2) *Of* St. Bartholomew Exchange -	100	0 —	200	0	0
(3) *Of* St. Bridget *alias* Brides -	120	0 —	200	0	0
(4) *Of* St. Bennet Finck - -	100	0 —	200	0	0
(5) *Of* St. Michael Crooked-lane -	100	0 —	200	0	0
(6) *Of* St. Christopher [united to St. Margaret Lothbury by 21 *G.* 3. *c.* 71.] - - -	120	0 —	366	13	4
(7) *Of* St. Dionis Back-church -	120	0 —	200	0	0
(8) *Of* St. Dunstan in the east -	200	0 —	333	6	8
(9) *Of* St. James Garlick-hythe -	100	0 —	200	0	0
(10) *Of* St. Michael Cornhill - -	140	0 —	233	6	8
(11) *Of* St. Michael Bassishaw - -	132	11 —	228	18	4
(12) *Of* St. Margaret Lothbury -	[See St. Christopher.]				
(13) *Of* St. Mary Aldermanbury -	150	0 —	250	0	0
(14) *Of* St. Martin Ludgate - -	160	0 —	266	13	4
(15) *Of* St. Peter Cornhill - -	110	0 —	200	0	0
(16) *Of* St. Stephen Coleman-street -	110	0 —	200	0	0
(17) *Of* St. Sepulchre - -	200	0 —	333	6	8
(18) *Of* Alhallows Bread-street, *and* St. John Evangelist - -	140	0 —	233	6	8
(19) *Of* Alhallows the great, *and* Alhallows the less - - -	200	0 —	333	6	8
[582] (20) *Of* St. Alban Wood-street, *and* St. Olaves Silver-street - -	170	0 —	283	6	8
(21) *Of* St. Anne *and* Agnes, *and* St. John Zachary - -	140	0 —	233	6	8
(22) *Of* St. Augustine, *and* St. Faith -	172	0 —	286	13	4
(23) *Of* St. Andrew Wardrobe, *and* St. Anne Blackfriars - -	140	0 —	233	6	8
(24) *Of* St. Antholin, *and* St. John Baptist - - - - -	120	0 —	200	0	0
(25) *Of* St. Bennet Grace-church, *and* St. Leonard Eastcheap -	140	0 —	233	6	8

	[Increased by 44 G. 3. c. lxxxix.] £	s.	to £	s.	d.
(26) *Of* St. Bennet Paul's Wharf, *and* St. Peter Paul's Wharf -	100	0 —	200	0	0
(27) *Of* Christ-church, *and* St. Leonard Foster-lane - - -	200	0 —	333	6	8
(28) *Of* St. Edmond the king, *and* St. Nicholas Acons - -	180	0 —	300	0	0
(29) *Of* St. George Botolph-lane, *and* St. Botolph Billingsgate -	180	0 —	300	0	0
(30) *Of* St. Laurence Jewry, *and* St. Magdalen Milk-street -	120	0 —	200	0	0
(31) *Of* St. Magnus, *and* St. Margaret New Fish-street - -	170	0 —	233	6	8
(32) *Of* St. Michael Royal, *and* St. Martin Vintry - - -	140	0 —	233	6	8
(33) *Of* St. Matthew Friday-street, *and* St. Peter Cheap - -	150	0 —	250	0	0
(34) *Of* St. Margaret Pattons, *and* St. Gabriel Fenchurch - -	120	0 —	200	0	0
(35) *Of* St. Mary at Hill, *and* St. Andrew Hubbard - -	120	0 —	333	6	8
(36) *Of* St. Mary Woolnoth, *and* St. Mary Woolchurch -	160	0 —	266	13	4
(37) *Of* St. Clement Eastcheap, *and* St. Martin Orgars - -	140	0 —	233	6	8
(38) *Of* St. Mary Ab-church, *and* St. Lawrence Pountney -	120	0 —	200	0	0
(39) *Of* St. Mary Aldermary, *and* St. Thomas Apostle - -	150	0 —	250	0	0
(40) *Of* St. Mary le Bow, St. Pancras Super-lane, *and* Allhallows Honey-lane - -	200	0 —	353	6	8
(41) *Of* St. Mildred Poultry, *and* St. Mary Cole-church - -	170	0 —	283	6	8
(42) *Of* St. Michael Wood-street, *and* St. Mary Staining - -	100	0 —	200	0	0 [[illegible]]
(43) *Of* St. Mildred Bread-street, *and* St. Margaret Moses -	130	0 —	216	13	4
(44) *Of* St. Michael Queenhythe *and* Trinity - - -	160	0 —	260	13	4
(45) *Of* St. Magdalen Old Fish-street, *and* St. Gregory - -	120	0 —	200	0	0
(46) *Of* St. Mary Somerset, *and* St. Mary Mountshaw - -	110	0 —	200	0	0

	[Increased by 44 G. 3. c. lxxxix.]		to		
	£	s.	£	s.	d.
(47) *Of* St. Nicholas Coleabby, *and* St. Nicholas Olaves - -	130	0 —	216	13	4
(48) *Of* St. Olave Jewry, *and* St. Martin Ironmonger-lane - -	120	0 —	200	0	0
(49) *Of* St. Stephen Walbrook, *and* St. Bennet Sheerhog - -	100	0 —	200	0	0
(50) *Of* St. Swythin, *and* St. Mary Bothaw - - -	140	0 —	233	6	8
(51) *Of* St. Vedast *alias* Foster's, *and* St. Michael Quern - -	160	0 —	266	13	4

In 1819, a petition was presented to parliament by the fire act clergy for leave to bring in a bill further to increase their stipends. Leave being given, the bill was printed, but subsequently withdrawn. (5)]

Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as hereinafter is directed, shall be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests to the respective parson, vicar, and curate of any parish for the time being, or to their successors respectively, or to others for their use) of the said respective parsons, vicars, and curates, who shall be legally instituted, inducted, and admitted into the respective parishes aforesaid. [22 & 23 *C.* 2. *c.* 15. § 3. 44 *G.* 3. *c.* lxxxix. § 2.]

And for the more equal levying of the same upon the several houses, buildings, and other hereditaments within the respective parishes, assessments were ordered to be made before July 24, 1671, upon all houses, shops, warehouses, and cellars, wharfs, keys, cranes, water-houses, tofts of ground (remaining unbuilt), and all other hereditaments whatsoever (except parsonage or vicarage houses), the whole respective sum by this act appointed, or so much of it as is more than what each impropriator is by this act injoined to allow. [22 & 23 *C.* 2. *c.* 15. § 4, 5, 6, 7.]

And three transcripts of the assessments were to be made; one to be deposited amongst the records of the city, another in the registry of the bishop of London, and another in the parish vestry respectively, for a perpetual memorial thereof.

The sums assessed to be paid to the respective parsons, vicars, and curates, at the four most usual feasts, to wit, at the annunciation of the blessed Virgin, the nativity of St. John Baptist, the feast of St. Michael the archangel, and the nativity of our blessed Saviour, or within fourteen days after each of the feasts aforesaid.

(5) See *Tyrwhitt's* "Argument on Tithes in London."

by equal payments; the respective payments thereof to begin and commence only from such time as the incumbent shall begin to officiate or preach as incumbent. § 9.

[By 44 *G.* 3. *c.* lxxxix. § 2. Power was given to make the new assessments on houses and other buildings before 21st August, 1804, by the aldermen and common council and churchwardens in each ward.

By § 3. power of appeal was given to the lord mayor and court of aldermen against assessments. By § 4. assessments may be altered every seven years.

By § 6. four *transcripts* of the assessments were to be made; one to be kept in the town clerk's office, another in the bishop's registry, another in the parish vestry, and the fourth to be delivered to the incumbent of each such parish respectively, for a perpetual memorial thereof.

By § 7. the said sums shall be payable by quarterly payments on 25th December, 25th March, 24th June, and 30th September, in every year.]

[By 22 & 23 *Car.* 2. *c.* 15. § 10.] *Impropriators shall pay what* bonâ fide *they have used and ought to pay* (6) to the respective incumbents at any time before the said late fire; the same to be computed as part of the maintenance of such incumbent. [And by 44 *G.* 3. *c.* lxxxix. § 8. this provision is recited; and it is further enacted, that in the parishes of *St. Brides*, *St. Bennet Finch*, *St. Mary Aldermanbury*, *St. Stephen Coleman-street*, *Alhallows the less*, *Christ Church*, *St. Lawrence Jewry*, *St. Lawrence Poultry*, and *St. Mary Cole Church*, the impropriators shall continue to allow and pay to the respective incumbents of the same parishes what they have been accustomed to allow and pay before and since the passing of 22 & 23 *Car.* 2. *c.* 15.; which said sums shall be paid to the incumbents of the same respective parishes in part of the respective sums hereinbefore appointed to be the certain annual maintenance of the same respective incumbents. By § 9. the vicar of *St. Sepulchre*'s shall from 29th September, 1804, receive the full sum directed by this act, instead of the one-third of the impropriate tithes due to him by endowment from the *London* part of the parish; but exclusive of the one-third of the tithes due to him in like manner from the *Middlesex* part thereof.

44 *G.* 3. *c.* lxxxix. § 10. is for continuing certain compensations out of the city chamber, in lieu of houses taken down, &c. By § 11. the sums assessed shall be recovered in case of refusal of

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(6) Thus, though the *fire act clergy* were shut out by this act from any further claims, *impropriators* in fire act parishes, where impropriation is, may enforce payment of 2*s.* 9*d.* in the pound on rack rents, under 37 *H.* 8. *c.* 12. *Sayer* v. *Mumford*, 1 *Wood's Dec.* 324. *Townley* v. *Wilson*, 2 *id.* [illegible]

payment, by warrant of a magistrate. By § 13. if the sums assessed shall be paid as therein mentioned, they shall not be raised as before directed. By §§ 13, 14. churchwardens, &c. may make yearly assessments, with appeal to court of aldermen. By § 15. sums assessed by the churchwardens, &c. may be levied by warrant of a magistrate. By § 16. if the monies to be assessed by the churchwardens as in §§ 13, 14., are unpaid for thirty days after any quarter day of payment, the same shall be raised in the same manner as the first assessment. § 17. exempts quakers from being collectors under this act.

[Powers of 22 & 23 C. 2. c. 15. and of this act vested in the lord mayor and court of aldermen; or on their failure, in two of the barons of the exchequer.]

By § 18. all and singular the powers and authorities in and by the 22 & 23 *Car.* 2. *c.* 15. given to and vested in the lord mayor and court of aldermen, are vested in the said lord mayor and court for the time being, for and in respect of all and singular the matters and things in this act contained, or by this act enacted, so far as the case is or shall be applicable; and that in case the said lord mayor and court of aldermen shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such things relating either to the assessing or levying the respective sums aforesaid, as they are by this act authorised and required to perform, either expressly or by reference, then it shall be lawful for any two or more of the barons of H. M.'s court of exchequer, by warrant or warrants under their hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this act, might or ought to have done; and by such warrant either to impower any person or persons to make the respective assessments as aforesaid, or to authorise the respective officers or persons appointed to collect such assessments, to levy the same by distress and sale of the goods of any person or persons who shall refuse or neglect to pay the same in manner and form as aforesaid.]

And if any inhabitant shall refuse or neglect to pay to the incumbent the sum appointed by him to be paid (the same being lawfully demanded upon the premises); it shall be lawful for the lord mayor, upon oath to be made before him of such refusal or neglect, to grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day time, to levy the same by distress and sale of the goods of the party so refusing or neglecting; restoring to the owner the overplus over and above the said arrears and the reasonable charges of making such distress. 22 *Car.* 2. *c.* 15. § 11.

And if the lord mayor shall refuse or neglect to execute any of the powers to him given by this act; it shall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the exchequer, by warrant under their hands and seals respectively,

to do and perform what the said lord mayor might or ought to have done in the premises. *Id.* § 12.

Provided, that no court or judge, *ecclesiastical* (7) or temporal, shall hold plea of or for any the sum or sums of money due and owing, or to be paid by virtue of this act, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful to or for any parson, vicar, curate, or incumbent, to convent or sue any person assessed as aforesaid, and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid. *Id.* § 14. [and 44 G. 3. *c.* lxxxix. § 19. S. P.]

Provided also, that it shall be lawful for the warden and minor canons of St. Paul's, parson and proprietors of the rectory of the parish of St. Gregory aforesaid, to receive and enjoy all tithes, oblations, and duties arising or growing due within the said parish, in as large and beneficial manner as formerly they have or lawfully might have done. 22 *Car.* 2. *c.* 15. § 15.

In the case, *ex parte Savage*, rector of the united parishes of St. Andrew Wardrobe and St. Anne Blackfriars, and *ex parte Wood*, rector of St. Michael Royal and St. Martin Vintry, which came before lord *Harcourt* on petition, Oct. 29, 1713, setting forth, that the petitioners had respectively demanded of the inhabitants the respective rates and arrears for the houses in their respective occupations, but they refused to pay the same, and [565] that the petitioners applied to sir Richard Hoare, lord mayor, for such warrants as the act of parliament directed him to grant for levying the said money, and he refused to grant such warrants; wherefore it was prayed that his lordship would grant the petitioners his warrant to levy the several sums of money so respectively due to them, by distress and sale of the goods to the defaulters. Lord Harcourt, thinking the matter of great consequence to the London clergy in general, as no such complaint since the making of the act had been before made to the lord chancellor, or lord keeper of the great seal, or to any two of the barons of the exchequer, desired the assistance of Mr. Baron Bury and Mr. Baron Price; and on the 2d Dec. following it came on again in their presence, when it appeared that several of the quarterly sums claimed by the petitioners became due and in arrear when the houses stood empty, or were in the possession of former tenants or occupiers thereof; and a

(7) The ecclesiastical court is seldom able to execute its jurisdiction over tithe causes in London; for if accounts are necessary, or if in cases of fraud the prosecution of the right depends on matter of discovery, and in all cases relating to *customary payments*, recourse must be had to another jurisdiction. (See *page* 560.)

question thereupon arising, whether such sums so assessed upon the several houses, for making up certain annual sums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houses whereon they had been so assessed, so that the arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions was adjourned to Dec. 23., upon which day the two barons certified their opinion, that by the statute the sums assessed on the several houses are become real charges upon the houses, so that the arrears which ought to have been paid by the former occupiers, or which became due when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers: and lord Harcourt declared he entirely concurred in opinion with the barons, and that the petitioners were at liberty to apply to him for warrants of distresses, as prayed by their petition. 3 *Atk.* 639.

And in the case, *ex parte Croxall*, minister of the united parishes of St. Mary Somerset and St. Mary Mountshaw, Apr. 25, 1748; where the lord mayor had heard the parties, and was of opinion not to grant the warrant, and thereupon it was urged that the lord mayor's determination was final, and nothing further could be done; lord *Hardwicke* said, that the lord mayor's determination is final only in cases of appeal brought before him,
[566] but here the only act he has to do is to issue his warrant, which having refused to do, the lord chancellor held that he had jurisdiction to inquire whether the lord mayor had done right in refusing the warrant; and if of opinion the lord mayor had done wrong, he could then issue his own warrant for levying the assessment. 3 *Atk.* 639.

In the case of *The Warden and Minor Canons of St. Paul's* v. *Morris*, the bill filed by the plaintiffs stated their title, as parson and proprietors of the church of St. Gregory, under letters patent, 24th *Hen.* 6., to all tithes, &c. within the said parish: It stated also the decree, made on the 23d Feb. 1545, in pursuance of the statute 37 *Hen.* 8. *c.* 12., by which it was ordered, that the inhabitants of London should pay tithes at the rate of 2*s.* 9*d.* in the pound: The bill further stated the act of parliament 22 *Ch.* 2. *c.* 11. for rebuilding the city of London, by which the parishes of *St. Mary Magdalen, Old Fish-street*, and *St. Gregory* were united, and the act 22 & 23 *Ch.* 2. *c.* 15., by which the tithes of those two parishes were fixed at 120*l.*, *both those acts saving expressly the right of the plaintiffs to the tithes of the parish of St. Gregory;* and the bill prayed an account of the tithes due from the defendants, occupiers of houses within the said parish. After two trials at bar in favour of the claim of the plaintiffs to tithes at 2*s.* 9*d.* in the pound, upon an issue whether any and what less sum had been paid, a motion was made for a new trial on

the ground that evidence had been improperly rejected. The court refused to grant a new trial, being of opinion that the evidence offered on the part of the defendants, though proving that a less sum than 2*s*. 9*d*. in the pound had been paid, did not shew any *certain* payment in lieu of tithes. 9 *Ves*. 155.

Customary tithes for houses not in London. (See *p*. 560.)

In some places, particularly in the neighbourhood of London, though not within the city, and therefore not within the 37 *H*. 8., a sum of money is paid for each house, in the nature of a *modus decimandi*. See *Hobart*, 10.; and *Dr. Grant*'s case, 11 *Rep*. 15. In *Pocock* v. *Titmarsh*, *Bunb*. 102., it appeared that this payment, which was 12*s*. *per* house, was the only provision for the vicar of St. Saviour's Southwark; and the court decreed an account without directing an issue.]

For the stipends of the ministers of the fifty new churches, provision is made by the several acts of parliament relating thereunto, to be raised from the duties on coals.

[Particular churches.]

There are moreover several particular statutes for particular churches, in London and elsewhere.

After all, these pecuniary compensations, however reasonable at first, must in process of time become insufficient, as the value of money decreaseth. And this hath been the case of all moduses; which, at the time of their commencement, were the real value of the tithes. On the other hand, it must be acknowledged that the payment of tithes in kind is in many respects troublesome and inconvenient. If a method could be established, that the minister should receive an equivalent durable, and not liable to diminution by the fluctuation of money, the people generally would be desirous to purchase their tithes at the highest supposable estimation: which, if employed in a purchase of land, the value thereof would continue in proportion as the tithes would have done, forasmuch as the annual rent of the land will always be according to its produce.

Form of a lease of tithes.

THIS indenture, made the day of in the year —— between A. B. *rector of the parish of —— in the county of of the one part, and* C. D. *of —— in the parish of and county of ——— yeoman, of the other part, Witnesseth, that the said* A. B., *for and in consideration of the rent* [567 *hereinafter reserved and contained, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said* C. D., *his executors, administrators, and assigns, all and all manner of tithes of corn, grain, hay, and herbage, yearly growing, increasing, or happening within the said parish of —— and all profits of what kind soever belonging to the parsonage or rectory there: To have, hold, receive, and take all and every the*

said tithes and profits unto the said C. D., *his executors, administrators, and assigns, from the day of the date of these presents, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be completed; if he the said* A. B. *shall so long continue rector of the said parish of* ———. *Yielding and paying therefore yearly and every year during the said term unto the said* A. B. *and his assigns, the rent or sum of* ——— *at and upon the days* ——— *by even and equal portions. Provided always, that if the said rent or any part thereof shall be behind and unpaid by the space of* ——— *days after the days and times appointed and limited for the payment thereof, then this present demise and every thing herein contained shall cease, determine, and be void. And the said* C. D. *doth for himself, his executors, administrators, and assigns, and for every of them, covenant, promise, and grant to and with the said* A. B., *his executors and administrators, and to and with every of them, by these presents, that he the said* C. D., *his executors, administrators, or assigns, shall and will from time to time, and at all times during the continuance of this demise, well and truly pay and satisfy the rent aforesaid, at the days and times aforesaid appointed for the payment thereof; and also shall and will pay and discharge all taxes which shall be imposed upon the said demised premises, or in respect thereof, by act of parliament or otherwise. And the said* A. B., *for himself, his executors, and administrators, and every of them, doth covenant, promise, and grant to and with the said* C. D., *his executors, administrators, and assigns, and to and with every of them, by these presents, that for and under the rents and covenants hereinbefore reserved and contained on the part of the said* C. D., *his executors, administrators, or assigns, to be paid and performed, he the said* C. D., *his executors, administrators, and assigns shall and may have, hold, and enjoy the tithes and premises aforesaid, and every part and parcel thereof, during the said term hereby granted, without any let, trouble, molestation, interruption, or denial of him the said* A. B., *or his assigns,*
[568] *or any other person or persons claiming or to claim by, from, or under him. In witness whereof the parties to these presents have interchangeably set their hands and seals, the day and year first above written.*

Signed, sealed, and delivered (having been first duly stamped) in the presence of E. F. G. H. — A. B. C. D.

Note. It is said generally in some books, that a verbal lease of tithes is not good. Others say, that tithes may be granted for one year without deed, but no longer. Others distinguish, and say, that a grant of tithes even for one year is not good by way of lease, but may be good by way of sale. Others, to the like pur-

pose, affirm, that if the parson agrees with the parishioner, that such parishioner shall keep back his own tithes for a year, this is a good bargain by way of retainer; but if he grants to him the tithes of another, though it be but for a year, it is not good unless it be by deed. *Cro. Ja.* 613. 1 *Roll. Rep.* 174. *God.* 354. *Freem. Rep.* 234. 2 *Brownl.* 17. (*l*)

Title for orders. See **Ordination.**
Toleration. See **Dissenters.**
Tomb stones. See **Burial.**
Translation. See **Bishops.**
Transubstantiation. See **Lord's Supper.**
Trees in the church yard. See **Church.**

Trentals.

TRENTALS, *trigintalia*, were masses for souls departed, to be said thirty times in such order as should be appointed; or [illegible]y days together; or otherwise every thirtieth day: according to the direction of the donor or founder, who instituted a stipend for that purpose.

Troper.

TROPER, *troperium*, is the book which containeth the sequences, which were devotions used in the church, after reading of the epistle. *Lind.* 251.

(*l*) Tithes may be leased; but a lease for more than one year must be by deed, as they are not capable of livery and seisin, but lie merely in grant. 3 *Bac. Ab.* 338. Where it is added, that, to make a lease for a year good, it ought not to be entered into till after the corn is sown; for then such agreement is in the nature of a sale or chattel *in esse,* which needs no writing. A lease of tithes by deed "for all the time the lessor should continue vicar," is good, as an estate for life, determinable on the event of his ceasing to be vicar. *Brewer* v. *Hill,* 2 *Anst. R.* 413. [Leases of tithes in Ireland for 21 years bind the successor. 3 *G.* 4. *c.* 125. See generally, *ante,* 441.]

Tunic.

TUNIC, *tunica*, was the subdeacon's garment, which he wore in serving the priest at the celebration of the mass. *Lind.* 252.

END OF THE THIRD VOLUME.

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